United States Court of Appeals
for the Second Circuit

APPENDIX

Vol. II

77-6152,74

JOINT APPENDIX, Volume II

In the

United States Court of Appeals

For the Second Circuit

No. 77-6152, 74

UNITED STATES COURT OF APPEALS
FILED
NOV 14 1977
[illegible]
SECOND CIRCUIT

BR/S

Hospital Association of New York State, Inc., Misericordia Hospital Medical Center, Buffalo General Hospital, The Genesee Hospital, and The Mount Sinai Hospital on behalf of themselves and all other nonprofit hospitals which are members of the Hospital Association of New York State, Inc., and which are reimbursed for Medicaid Services rendered to hospital patients,

Plaintiffs-Appellants,

—v.—

Philip L. Toia, as Commissioner of Social Services of the State of New York, Robert P. Whalen, as Commissioner of Health of the State of New York, Peter Goldmark, as Director of the Budget of the State of New York, Hugh L. Carey, as Governor of the State of New York,

Defendants-Appellees,

—and—

F. David Mathews, as Secretary of the U. S. Department of Health, Education and Welfare,

Defendant.

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS OF APPENDIX

Page

Relevant Docket Entries 1
New York State Plan Submittal 76-8 3
Appellants' Original Complaint. 6
New York State Plan Submittal 76-28 22
Appellees' Answer to Appellants' Original Complaint. 62
Transcript of Proceedings of July 15, 1976. 69
New York State Plan Submittal 76-41 89
Appellants' First Amended Complaint 92
Order to Show Cause 114
Affidavit of James C. Ingram 117
Affidavit of S. David Pomrinse 133
Affidavit of Irvin G. Wilmot 151
Affidavit of Darrell G. Hartline 158
Transcript of Proceedings of July 20, 1976 166
Affidavit of Seymour L. Budoff 260
Affidavit of William F. McCann 264
Appellees' Answer to First Amended Complaint. 280
Affidavit of James C. Ingram 288
Transcript of Proceedings of July 28, 1976 297
Oral Opinion of Judge Lasker of July 29, 1976 407
Judgment of the District Court dated July 29, 1976 (entered August 2, 1976). 428
New York State Plan Submittal 76-43. 432

Page

Appellees' Notice of Appeal of the August 2, 1976 Judgment to the Court of Appeals 435

Transcript of Proceedings of September 1, 1976. 437

Transcript of Proceedings of September 14, 1976. 457

Appellants' Second Amended Complaint. 481

Memorandum Opinion and Order of Judge Lasker on Stay of Judgment dated September 28, 1976 505

Transcript of Proceedings of September 28, 1976 511

Appellees' Answer to Second Amended Complaint 533

Order of Judge Lasker Staying Judgment of August 23, 1976. 542

Transcript of Proceedings of November 4, 1976 544

Memorandum Opinion and Order of Judge Lasker dated November 5, 1976 (entered November 9, 1976). 561

Correcting Memorandum of Judge Lasker dated November 11, 1976. 568

Endorsement of Judge Lasker dated November 16, 1976. 569

Appellees' Notice of Appeal of the November 9, 1976 Order to the Court of Appeals 570

Transcript of Proceedings of November 15, 1976 572

Appellees' Motion to Dismiss for Lack of Jurisdiction . . 577

Transcript of Proceedings of December 17, 1976 579

Affidavit of Jacob Imberman dated December 23, 1976, with exhibits 597

Endorsement and Order of Judge Lasker Denying Motion to Dismiss. 624

Transcript of Proceedings of February 3, 1977 626

Deposition of Seymour L. Budoff 630

Page

Opinion and Order of Remand of Court of Appeals dated March 16, 1977 631

Deposition of William McCann 635

Deposition of Robert P. Whalen 638

Transcript of Proceedings of April 21, 1977 640

Transcript of Proceedings of May 5, 1977 647

Transcript of Proceedings of July 21, 1977 680

Opinion of Judge Lasker Vacating Judgment dated August 4, 1977 684

Transcript of Proceedings of August 11, 1977 717

Order of Judge Lasker dated August 15, 1977, partially vacating August 2, 1976 judgment and ordering refund. 763

Appellants' Notice of Motion to Amend Order of August 15, 1977 765

Affidavit of Jacob Imberman in Support of Motion to Amend 767

Appellants' Notice of Appeal from Order of August 15, 1977 to Court of Appeals. 770

Transcript of Proceedings of September 14, 1977. 773

Endorsement and Order of Judge Lasker Amending Order of August 5, 1977, filed September 16, 1977 789

Appellees' Notice of Motion to Dismiss Complaint, and Memorandum 790

Amended Order partially vacating August 2, 1976 judgment and ordering refund, filed September 27, 1977. 816

Memorandum of Appellants in Opposition to Motion to Dismiss Complaint. 818

Page

Affidavit with exhibits and Memorandum of Health and Hospitals Corporation in Opposition to Motion to Dismiss Complaint. 832

Appellants' Notice of Appeal from Amended Order of September 27, 1977. 886

Endorsement and Order of Judge Lasker Dismissing Complaint dated October 13, 1977 888

Order of Judge Lasker dated October 14, 1977, that Order of October 13, 1977 be Entered as Judgment 891

Appellants Notice of Appeal to Court of Appeals from Judgment entered October 18, 1977 Upon Order of October 14, 1977 892

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---x

HOSPITAL ASSOCIATION OF NEW YORK STATE, et al.,
Plaintiffs,

vs.

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, et al.,
Defendants.

---x

70 Civ. 2027

New Yori, New York.
September 1, 1976 - 10:00 A.

Before:

HONORABLE MORRIS E. LASKER, District Judge.

APPEARANCES:

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New York, New York.
By: JESSE J. FINE, ESQ., Assistant Attorney General.

DAVID MATTHEWS, Secretary, U.S.Department of Health, Education and Welfare
By: ROBERT B. FISKE, JR., United States Attorney for the Southern District of New York.
By: JOHN M. O'CONNOR, Assistant United States Attorn

ALSO PRESENT:

AMBROSE DONOVAN, New York State Department of Health

CARMINE SHANG, Counsel, New York State Department of Social Services

JONATHAN BRANDES, New York State Department of Social Services.

THE COURT: Gentlemen, I got your letters which confirmed what I had informally been advised when I was in town a couple of weeks ago, that the Department of Health has approved some of the changes made by the State -- which were made July 1, and in the light of that approval the Court of Appeals has remanded the matter to me, although I have received no remand from them yet.

MR. IMBERMAN: I don't think it was a remand.

THE COURT: Suggested to you gentlement, was it?

MR. IMBERMAN: If I may just say this, and then I would like to have Mr. Fine talk about it. During the course of the argument on Mr. Fine's motion for a stay and an expedited appeal, somehow the question about the effective date of these regulations came up, and Mr. Fine expressed the view that it was the State's position that the regulations were retroactive to January 1.

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I expressed quite a bit of disagreement with his view, and Judge Van Graafeiland then suggested that before the Court of Appeals hear the appeal that perhaps the matter of this alleged retroactivity ought to be discussed with you and some sort of ruling received. It was as informal as all that.

MR. FINE: I think the timing is of interest. What happened was that my argument for an extension of your stay, or a stay pending appeal on expedited appeal came on before the Second Circuit on August 17 there.

On the night of August 16, I got word that the Department of HEW had approved two of the three regulations, and on the oral argument before the Court I noted that fact, that they had approved them the day before the argument.

I suggested that as far as the State was concerned we regarded this approval as retroactive to January 1 and I took the liberty of citing a passage from your opinion, to which Mr. Imberman vehemently objected as not being the correct construction.

Judge Van Graafeiland said we would not like to hear this appeal piecemeal. We think before the appeal is heard there should be a determination by District Judge Lasker of what is in effect the effective date of these approvals.

The State takes the position they are effective as of the beginning of the year, when they were intended to be applied to the rate structure for 1976.

Mr. Imberman, of course, would take the opposite view.

THE COURT: Let me ask a question before we go further. There is a little bit of ambiguity in my mind as to whether we are talking of one of two or three things. Namely, whether we are talking about the retroactivity of the regulation as viewed by the State or the retroactivity of the approval by HEW as viewed by HEW, or whoever has to make a pronouncement.

MR. IMBERMAN: The answer to that, your Honor --

THE COURT: Or both.

MR. IMBERMAN: -- is very simple, because your Honor has already ruled --

THE COURT: Just a minute. Wait a minute. I don't think you can give the answer, because what I am really asking, Mr.Fine, is what is the position of the State.

MR. FINE: The position of the state is that the regulation should be -- the approval vitalizes these regulations as of January 1, 1976.

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THE COURT: I suppose it is necessarily sumsumed in that the State regards its own regulations as being retroactive.

All right. That question as to the position of the State has been answered in my mind.

Naturally, I am prepared to do whatever the Court of Appeals believes should be done. What effect that will have on my previous decision, of course, would also, I suppose, have to be dealt with.

MR. O'CONNOR: Excuse me, your Honor. The Department of Health,Education & Welfare also has a position on this.

THE COURT: I assume so. Since the question relates to the effect of the approval, the very first thing that would occur to me would be to ask them what they would believe to be the effect of their approval.

MR. O'CONNOR: That is not retroactive that the effective date is the date of the approval. It doesn't go back and cover to any date prior to approval.

THE COURT: It is nice to sit around and say what is your position, and what is your position, but I am a Judge, and I have to decide on the basis of some kind of authority or argumentation, of course, and I don't expect that to be given at least in final form today, although perhaps you are in a position to give it in less than final form.

I would like to arrange before we break up as to how we are going to dispose of this question. Suppose we talk about it now, Mr. Imberman.

MR. IMBERMAN: I would like to suggest to your Honor any careful consideration of the problem should indicate there can't be a question of retroactivity because your Honor has already ruled these regulations cannot be implemented without HEW approval.

What we are doing is operating until that date. The State of New York and the Hospitals have been operating under the State plan approved in 1974. It was only on August 16th that HEW announced the approval of two of the regulations. You heard Mr. O'Connor that the Government's position is that this is not retroactive. It seems to me it must follow that everything that hospitals did up to and including the 15th day of August was under the State plan that had last been approved in 1974.

It was only after August 16, when there was an amendment, that the State plan became amended on that day.

Your Honor has ruled until the approval they can't put these regulations into effect.

I might add one other thing, your Honor. Despite what Mr. Fine says now, I don't think there is a single thing, any place in existence -- at least nothing that I have ever seen -- pursuant to which the Health Department, the State of New York, or the Department of Social Services, announced that these regulations were to be retroactive to January 1, 1976, and, indeed, something that I think ought to be made part of the record, when they filed these documents with HEW for approval they announced on the face of the cover sheet, "Proposed effective date not January 1, 1976."

THE COURT: I don't want to proceed in this meetingon the lopsided basis of hearing a full argument on the merits by you and a statement of position by the others.

The first thing I would like to hear is whether you wish to present your arguments in full today, and let me take it from there, or whether this meeting was intended to make arrangements for how to dispose of this issue.

I will say this, Mr.Fine, without attempting to reach a final conclusion on the question. I think that -- let me put it this way. It is the State's burden to prove that these regulations would have retroactive effect. It would be formal to assume they would have

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prospective effect rather than retroactive effect. We should proceed accordingly.

MR. FINE: I am willing to assume that burden of convincing your Honor.

It seems to me that the question boils down to basically a question of law. I don't know if there are any factual issues about it. I mean such facts as the date of submission appear on the record.

THE COURT: It doesn't depend on the whim of the HEW people, it is a matter of law.

MR. FINE: I imagine your Honor would require from us memorandums or briefs setting forth our arguments. We have evolved a number of arguments to sustain our position.

THE COURT: I agree.

Without setting times at the moment, why don't we agree on this kind of arrangement. I think this is the sort of issue on which the briefs probably should respond to each other instead of coming in and leaving arguments made that have not been answered, so why don't you get your briefs in by X time, and we will decide in a moment when, and then Mr. Imberman and the Government, and then if there is anything you have to reply, you will have a brief time.

Then if I feel I need to hear from you personally I will call you in forthwith, but I will try to avoid that, for you and for me.

MR. IMBERMAN: I would like to suggest there are certain factual matters that we submit to your Honor either by way of stipulation or some other way.

For example, I think we should make some way a matter of record here,what Mr. O'Connor has said, the Government's position, etc.

THE COURT: If that is what you mean by facts, yes.

Mr.Fine has just shaken his head.

MR. IMBERMAN: I would like to have as part of the record the various State submissions to HEW. For example, you will notice the one I have handed to your Honor has a proposed effective date by the State of May 28.

This one has a proposed effective date of July 28, 1976.

They were approved by HEW in August.

These things, I think, should be part of the record because your Honor certainly should be able to take these statements by the State --

THE COURT: I agree with you, and certainly the

Court of Appeals would want to see them, too.

MR. IMBERMAN: I would like to get together with Mr. Fine and work it out by way of stipulation.

MR. FINE: These proposals were preceded to most extent by prior submissions which I don't have with me, but in effect transmitted substantially the same regulation.

THE COURT: I take it that Mr. Imberman will not cause you any problem any more than you will him with regard to what the facts are. Maybe you will want to make reservations on some of the stipulations as to the relevance.

MR. IMBERMAN: I would like to sit down when Mr. Fine has all the things he thinks are relevant and we will go over them to see what should or should not be part of the record. I assume we will be able to agree on that.

THE COURT: Even if you can't agree on the relevance of anything, you can agree that they are facts.

MR. IMBERMAN: That is the point.

Does your Honor want to take up a timetable?

THE COURT: Yes.

MR. FINE: You realize HEW has neither approved nor disapproved the third regulation.

THE COURT: Which are the ones they have, and which is the one that is not? Refresh my recollection.

MR. FINE: The one regulation they did not approve, you will recall t here was a regulation disallowing 10 per cent of the cost paid of the interns'and residents' wages and fringe benefits as a basis for inclusion in the rate structure.

The other two regulations they did approva.

THE COURT: The one of the 100 per cent average?

MR. FINE: Yes, and the other which has the prospective effect of excluding certain costs and computing the future rates.

THE COURT: Incidentally, I did my best to struggle through Judge Fine's opinion that was reported in the Law Journal yesterday. I take it, however, it has very little to do with this case.

MR. IMBERMAN: Nothing.

MR. FINE: That is right.

THE COURT: I did see something about costs in there.

MR. IMBERMAN: I have two other matters I would like to take up briefly, and I am glad the gentlemen fromAlbany are here.

I would greatly appreciate if we could get a report as to the extent of the STate's compliance with your Honor's order, which was for a prompt recomputation of these rates.

We are now in September, and I just don't know what is going on, but I know the hospitals aren't being paid the way they are supposed to be paid as far as everything that comes to me. I was wondering if perhaps these gentlemen could tell us.

MR. FINE: I inquired yesterday. Commissioner McCann is on vacation and I spoke to Mr. Davidoff, who is his right-hand man, as you know.

They have a group of people working on recomputing the 1976 rate for the first six months based on the 195 formula. In other words, without regard to the new regulations.

They have been certainly affected by the fact that it is the summer and people have gone on vacation.

Also, despite Mr. Ingram's casual dismissal of the fact it could only take ten minutes per hospital, it is a much more complicated job than that.

THE COURT: You mean Mr. Imberman?

MR. IMBERMAN: Mr. Ingram is my expert.

MR. FINE: Taking each hospital one by one and recomputing the 1976 rate under the 1975 formula is a

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much more complicated formula than Mr. Ingram, Mr. Imberman's expert, indicated.

Mr.Davidoff told me they have a whole group of people working on it. He believes it would be a matter of a couple of weeks. They are complying with your order to recomput e the rates.

From time to time Mr. Imberman has called me and told me that various local welfare districts were n paying the hospitals in accordance with the 1976 rates promulgated on July 1, and I have taken that up in each individual case with either Commissioner McCann or Mr. Evans in his office, and I have been told necessary correctional instructions have been issued.

THE COURT: What are your referring to?

MR. FINE: The State operates through 14 welfare districts. The Vtate of New York is one welfare district, for instance.

There is a County welfare office, say Seneca County, I think that is the last one you complained to me about, it may not be the whole welfare district, but Seneca County, in any event, was not complying with your Honor's order, and it takes straightening out. It is a confusing situation for the State as well as the hospitals.

I have tried to oblige Mr. Imberman in every respect on that.

MR. IMBERMAN: I appreciate that very much, but despite the fact that people go on vacations, the hospitals have to pay the people who work for them and meet their bills, so everything that can be done to move this along I would appreciate.

I hope you won't mind if the people from the Hospital Association talk to Mr.Davidoff to try to satisfy themselves as to what is going on.

MR. FINE: I appreciate it. All I do is act as a conduit for the complaint.

MR. IMBERMAN: More than a month has gone by.

Can the hospitals whose rates have been recomputed start to get paid under the proper rate or do they have to wait until all 300 hospitals get finished?

MR. FINE: I don't know.

MR. IMBERMAN: Perhaps some of these gentlemen would.

MR. FINE: I don't think so.

MR. IMBERMAN: Once a rate is recomputed it should be paid rather than wait.

MR. FINE: It has to go back to the Bureau of the Budget.

THE COURT: This is something I know nothing about.

MR. FINE: We will comply with Judge Lasker's order, but --

THE COURT: If there appears to be an indication, which there doesn't seem to be now, the State isn't proceeding in good faith or is idle or negligent, I will see what I can do.

MR. IMBERMAN: I will ask our people to communicate with the State authorities to see what they can work out.

One other thing, your Honor.

In view of the fact your Honor made it very clear that you were in your opinion reserving on the issue of reasonable costs, not ruling on that, now that we have had an approval of HEW of those two regulations, I intend to askyour Honor for permission to amend our complaint to in effect bring again before your Honor the issue of reasonable costs, because I do not believe --

THE COURT: Where do you need to amend it? Isn't it there anyway? Isn't it residually there from the last amended complaint? I never meant to indicate, and I didn't think I did, in my opinion, as you call it, which I guess it was, although it was oral, that I had done

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anything but rule on the issue as to the necessity of approval by HEW.

MR. FINE: ON the issue of reasonableness -- what you are raising is the question of the reasonableness --

MR. IMBERMAN: Reasonable costs of compliance with the statute. Technically speaking, the reason I said I might want to amend is because a judgment was entered on the first cause of action and the judgment said that the first cause of action is severed.

THE COURT: Yes.

MR. IMBERMAN: Since reasonable costs was in that first cause of action, I was troubled technically. I felt I could do it either by filing another complaint and ask to have that referred to your Honor or --

THE COURT: If because of the peculiarities of the procedural history of this case it is necessary to amend the complaint, I think that the plaintiffs are entitled to do so. I don't think the State at any time believed that I ruled or intended to rule on the question of reasonable costs.

MR. FINE: That is right.

MR. IMBERMAN: Reasonable costs would have to be a matter on which I assume there would have to be hearings, discovery, and whatnot. This is something we would have to get into on a factual basis.

THE COURT: I would feel quite uneasy on having to decide that question solely on the basis of the two or three precedents that have been cited to me.

MR. IMBERMAN: I think we really have to get into the facts on that.

MR. FINE: Do you intend to serve an amended complaint then?

MR. IMBERMAN: Yes. I take it you would have no objection.

MR. FINE: No.

MR.IMBERMAN: Mr. O'Connor?

MR. O'CONNOR: No, but it takes us longer than the ten days to respond.

MR. IMBERMAN: To date? It will be almost what it was before.

MR. O'CONNOR: From prior experience I don't think we can answer in ten days. If you can agree there will be an extension to 30 days or something like that, there will be no problem.

THE COURT: I see no reason in the posture of this case why even if the Government hadn't answered an amended complaint the parties couldn't proceed to the discovery that they know would be necessary, because I can't imagine I wouldn't approve -- of course I am not approving a blanket amendment but if the amendment is solely for purpose of assuring the issue of reasonable costs remains in the case, I can't imagine what the Department of Justice would say that would lead me to disapprove such an amendment. I almost wonder whether it is not still in there, but maybe it isn't.

MR. O'CONNOR: I just wanted it as an alert.

THE COURT: I think it is well to state it on the record, but I don't see why it should hold things up.

MR. IMBERMAN: We will get a second amended complaint served promptly.

THE COURT: Let's talk about the timing of the next steps here.

Subject to your working out a stipulation as to the facts which can include disagreements about relevance, if there are any, I would think the first point is to determine when Mr.Fine's brief would be submitted.

I am not sure he needs to wait for the stipulation to be complete, but I suppose it would be better if it were complete, so how long do you want for the stipulation?

MR. FINE: Would your Honor give us a couple of weeks?

THE COURT: I will give you all the time you want. You are the one now under pressure.

MR. FINE: This is the 1st of September. I don't have a calendar in front of me --

THE COURT: Why don't we make it the 15th? Nobody seems to have been unfair about that kind of thing. I would rather have a target date not more than two weeks from now.

MR. IMBERMAN: Could we have until the 30th? I am going to take off a week in September, so if we could have until the 30th.

THE COURT: Yes. That would be for the Government, too, regardless of how many times they have to answer pleadings, I think they have to answer motions the same.

MR. IMBERMAN: I don't see there would be any problem with the stipulations.

THE COURT: I can't see any reason there should be.

I will get to work on it as soon as I get the material.

Let's just state this on the record.

If, Mr. Fine, you wish to respond or reply to the answering papers, let's say you will do it within a week after receiving them.

MR. FINE: You are speaking of his brief, his memorandum of law?

THE COURT: Yes.

MR. FINE: All right.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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HOSPITAL ASSOCIATION OF NEW YORK STATE, et al.,

Plaintiffs,

- v s -

70 Civ. 2027

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, et al.,

Defendants.

---x

Before:

HON. MORRIS E. LASKER,
District Judge.

New York, New York
September 14, 1976 - 4:30 p.m.

Appearances:

PROSKAUER, ROSE, GOETZ & MENDELSOHN, ESQS.,
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By: JACOB IMBERMAN, ESQ.,
SUSAN ROSENFELD, ESQ., of counsel.

LOUIS J. LEFKOWITZ, ESQ.,
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New York, New York;
By: JESSE J. FINE, ESQ.,
Assistant Attorney General.

bssr

Appearances: [continued:]

DAVID MATTHEWS,
Secretary U. S. Department of Health,
Education and Welfare;
By: ROBERT B. FISKE, JR., ESQ.,
United States Attorney for the
Southern District of New York;
By: JOHN M. O'CONNOR, ESQ.,
Assistant United States Attorney.

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(In chambers)

MR. FINE: Judge, I would like to tell you what the present situation is with respect to the 1976 hospital Medicaid in-patient rates that are set up.

Pursuant to your order the Commissioner of Health has recomputed all of the rates to be paid to hospitals under the old Medicaid formula, that is the formula that was in effect as of 1975 before these new regulations were promulgated.

I understand as a result of a telephone conversation today that those rates are now being certified to the Director of the Budget.

For your information I will tell you that ever since the adoption of the Cost Control Act of 1969, which is New York State Act Public Health Law Section 2807, the Director -- the Commissioner of Health in the first instance computes the Medicaid rates and certifies them and they are approved by the Director of the Budget.

He is now transmitting the rates to the Director of the Budget.

In the session of the Legislature -- in the session of the Legislature just past, the Legislature altered the responsibility of the Director of the Budget with respect to the approval of rates and while the Director of the Budget is obviously, since he was a party to this litigation, bound by your determinations in this case, I don't think that anywheres in your determinations you attempted or even considered eliminating the discretion conferred on the Director of the Budget by Section 12 of Chapter 76 of the laws of 1976.

That requires the Director of the Budget, after the Commissioner of Health has certified the rates, to consider whether or not in effect the state can afford it.

The Director of the Budget may very well feel that the rates promulgated under the old formula are beyond the capacity of the state to meet. I would like to show you, if I may just for your information, Section 12of Chapter 76, which became law, I believe, around March 30th.

You can just glance through it. In substance it does what I say, which is, up to now the Director of the Budget has simply been required to approve the rates. In March the Legislature extended his approval so that he should consider the economic factors involved.

THE COURT: May I ask you a question, whether this section, which of course I haven't had a chance to familiarize myself with, applies to -- whether there

bsrf 3

is no question that it applies to Medicaid.

MR. FINE: No question. It applies to Medicaid.

THE COURT: Regardless of what effect it has on the litigation, do you agree that it intends to apply to Medicaid? It reads as follows:

"Prior to the approval of rates of payment for hospitals exclusive of residential health care facility, and so on, made by government agencies, the State Director of Budget shall take into consideration," and so on."

It occurred to me as I read it that the federal statute, of course, imposes a duty, as I see it, on the State Government, and there may be a question as to whether the State Legislature can legislate in any way inconsistent with the federal statute and that therefore it was possible that this might not have been meant to apply to Medicaid but might apply to some other types of services.

MR. FINE: I think it a fair statement, and I think upon reading the statute you will see that it clearly applies to Medicaid payments.

I have no idea at this moment what the Director of the Budget's action will be.

THE COURT: Let's assume it both ways.

MR. FINE: Assume that he says the state cannot afford these rates computed under the 1975 formula. Then he returns it to the Commissioner of Health to recompute the raise within the limits he sets. This is a new problem that has not been raised before.

Up to now I have been perfectly agreeable, the Director of the Budget has been a party to this litigation, he is bound by your decision which stands and says that the new regulations are invalid. But it does not follow that that abrogates his responsibility to determine whether rates computed under the old formula are still not in excess of the state's capacity to pay. That is item No. 1 I wanted to bring to your Honor's attention.

Item No. 2 I wanted to bring to your Honor's attention, and I want here to bitterly contest the --

THE COURT: Let's say vigorously.

MR. FINE: Vigorously, I beg your pardon, vigorously contest the insinuation, the explicit statement that the state has been laggard in computing these rates.

Your order I think was made around the 1st of August --

THE COURT: Let me just make one statement. I have no objection whatsoever to your making any statement you wish on the record. If you are concerned that you made that impression with me, you have not.

MR.FINE: All right, sir.

THE COURT: That impression is an impression I have, if you feel that, I have not.

MR. FINE: The computation of the rates was not an easy matter. It also hit the Department of Health at a time when a good deal of the personnel was on vacation and we had all sorts of problems, but it has now been completed and it is now being certified and I should hear from the Director of the Budget within the next few days.

However, it occurred to me, and this is really why I wrote you a letter, that if in the event your Honor should hold that HEW's approval of August 16th of the two resolutions, which it has already approved -- parenthetically I will tell you what I told Mr. O'Connor and Mr. Imberman outside, I have heard that with a modification, HEW has indicated that it will approve the third regulation, the one dealing with interns and residents costs, eliminating some of the language in which dates are referred to.

THE COURT: I assume your position will be that when it is approved it is also to be retroactive.

MR. FINE: Yes. The reason I came to your Honor, wrote your Honor the letter yesterday, was this: Assuming that the new rates are promulgated, approved by the

Director of Budget and are promulgated, the hospitals are paid retoractively for the period January 1st to, let's say, August 16th, when the new regulations were approved, then your Honor, or the Court of Appeals, if the case should reach the Court of Appeals, says these approvals are retroactive to the first of the year, which was the state's intention initially, and which we hope to be able to prove to your Honor by evidence, then the state has to say to the 300 or 400 hospitals throughout the state, we have overpaid you --

THE COURT: Right.

MR. FINE: Historically, the way to recoup those overpayments would be to say to the hospitals, well, each welfare district in paying you now will deduct the amount of the overpayment from your current months' check.

I have some litigation, your Honor, involving four hospitals, which were overpaid substantially in prior years by the -- for Medicaid. These are all hospitals located in the City of New York, and the City of New York is the local welfare district seeking in cooperation with the state to recoup these overpayments.

Without regard to the justice of the claims, without regard to the legal basis upon which the recoupment is sought, the city is met, the state is met with this statement by the hospitals, and we believe it to be true, "If you deduct this substantial amount from our over -- from our current payments to recoup your overpayments, you put us out of business."

In one case one large hospital owes us close to $900,000, owes the city $900,000, the state, and that hospital has literally said, "Unless we can work out some way by which you can give us some relief we are going to have to close our doors."

What I am urging on your Honor is this, we think we can make out a fairly good case for the complete retroactivity of these regulations. I'm sure that -- you were kind enough to give us some time, Mr. Brandies has been working on it, I worked on it partially on the weekend, he has been working on it over the weekend, and we will work on it today and tomorrow, we think we can make a good showing that these regulations should be deemed retroactive to the first of the year, and if so it would create financial chaosand impose a burden on the hospitals, you see, if hospitals act like most people they probably spend the money as they see it. If we came and said to Mt. Sinai Hospital, we have now determined that we have overpaid you half a million dollars, Mt. Sinai

bsrf 8

might very well say well, you know, if you insist on deducting this from our next month's Medicaid check, or next couple of months Medicaid check, we will be bankrupt, out of business.

So I am asking respectfully that your Honor in effect change your order so that we are not required to pay the -- assuming the Director of the Budget goes along with the new revised rates, that we are not required to make payments under those new revised rates until your Honor has determined the issue of retroactivity.

I think that that is an issue which our brief is due on the 22nd and I think Mr. Imberman's brief is probably due as quickly thereafter as --

THE COURT: When is that?

MR. IMBERMAN: Two weeks after that.

THE COURT: About the 5th of October.

MR. FINE: I don't need a week to reply.

THE COURT: I will be going abroad for a meeting from the 10th to the 17th of October dealing with pretrial matters, but -- it will be about a month until I can get to it.

MR. FINE: Mr. Imberman still intends to serve an amended complaint --

MR. IMBERMAN: Within the next couple of days,

bsrf 9

your Honor.

MR. FINE: I haven't seen that, your Honor.

MR. IMBERMAN: It has nothing to do with retroactivity.

MR. FINE: I understand that. It will raise other issues which are probably germane to this case. At this point of time it seems to me to make good sense both from the hospitals'point of view as well as from the state's point of view to continue the present rate-paying structure -- I don't know of any hospital in the state that closed its doors as a result, they may be suffering a little bit, but I don't think they are suffering that acutely, and I just say that it doesn't make sense to put the hospitals and the state in the position of having then to recoup substantial amounts of money which may financially embarrass them.

THE COURT: Let me hear from Mr. Imberman on both the issues that you raised. Talk first about the question of the possibility of changing the order, because the issue that you raised about the Director of the Budget is an entirely new thing and I don't even know whether Mr. Imberman is prepared to comment on that. If he is, I would like to know what he thinks.

MR. IMBERMAN: I will therefore not discuss what

Mr. Fine called item No. 1, and that is the Director of the Budget theoretical power to overrule your Honor's order on the basis of his determination the state can't afford it.

I would like to address myself to the subject matter of Mr. Fine's letter, and that is his desire that the State of New York not pay the hospitals the monies that your Honor has already decided it should receive while he pursues this will'o the wisp of retroactivity, which only came up after your Honor decided this part of the case, and despite the fact that the Department of Health, Education and Welfare specifically has held that these changes in the regulations aren't retroactive.

THE COURT: Specifically has held? They made a statement on the record, yes.

MR. IMBERMAN: Yes. It is also my understanding that the -- I am not accepting as factual Mr. Fine's statement that HEW is going to approve the other Regulation 86.21, but the change -- I want to point out to your Honor the change that he told me he thought they were making deals with the elimination of the time period during which that regulation is effective under the state's promulgation. The time period is January 1, 1976 to March of 1977. As I understand the thinking, HEW is taking that out because they don't want, under any circumstances, to have a change retroactive.

THE COURT: That may be so. I would like to hear Mr. O'Connor on that.

MR. IMBERMAN: What we have here now, talking about the substance of this thing, is a situation where the State of New York has deliberately delayed making these payments to the hospitals. This is now the 14th of September --

THE COURT: Does anybody know how much money we are talking about for this period?

BSjw 1

MR. IMBERMAN: I would guess we are talking about in the neighborhood of twenty to $25 million.

THE COURT: For the nine or ten month period.

MR. IMBERMAN: $20 million for a six month period. If you went to a nine month period it would be closer to $25 million. Am I correct, gentlemen?

MR. FINE: In that range. We have no way of knowing.

THE COURT: Whether ten or twenty million we are talking about a lot of money.

MR. IMBERMAN: Now the state doesn't want to pay the money and the point is that the hospitals --

THE COURT: I realize that.

MR. IMBERMAN: The hospitals are being deprived of the use of the money that your Honor said they are rightfully entitled to --

THE COURT: I never said that. I said that they were wrongfully -- it was wrongfully taken away, I will put it that way.

MR. IMBERMAN: It was wrongfully taken away from them.

I don't know whether your Honor is aware of the fact that the state never pays interest on this money.

THE COURT: I was wondering about that.

MR. IMBERMAN: Not only doesn't it pay interes on the money but one of the regulations, which we haven't talked about now, but which we are going to attack in the second amended complaint, is a regulation which is in part 86, and it is 86.8F, and 86.8F says very simply that if the State of New York finds that a hospital has been overpaid on these Medicaid rates, the hospital has to pay the money back plus seven percent interest.

But if the state is under -- if the hospital is underpaid, there is no such payment of interest by the state. So what we have here is the State of New York holding on to monies which the hospitals are entitled to.

Let me call your Honor's attention to something else, that Mr. Fine doesn't talk about in his letter, there are really two kinds of payments that we are talking about. We are talking about the payments which the hospitals would be entitled to prior to August 16th when HEW approved the change in regulations.

Now, if it is not retroactive, and the hospitals are entitled to the hold rate from January 1, 1976 to August 16th, it is retroactive then you go back on the new rate to January 1st, but from August 16th on the hospitals are clearly entitled to the rate with the ceiling determined by the regulations which HEW approved, but without the ceiling

bsjw 3

on this ten percent for interns and residents.

THE COURT: Until they decide that.

MR. IMBERMAN: But why don't they pay the hospitals from August 16th on that rate?

THE COURT: I can't answer that.

MR. IMBERMAN: Mr. Fine ignores that point completely. Let me make a suggestion to your Honor --

THE COURT: Yes.

MR. IMBERMAN: We think the hospitals are entitled to the money now.

THE COURT: All the money?

MR. IMBERMAN: They are entitled to the money up until August 16th on the basis of the 1975 regulations. They have been paid substantially less than that. We think they should be paid the difference between the two rates now.

We will agree, the hospitals will agree that if your Honor should determine the retroactive issue against us, the State of New York can deduct that extra payment from every hospital on the next payment, because the difference in timeis going to be pretty small as far as I am concerned.

I think your Honor will decide this matter in October, you will have the briefs in, and it is not that bsjs 4

terrible an issue, and we probably won't get paid until the middle of September or the end of September no matter what happens.

I am perfectly willing to agree that if we lose they can deduct the money on the next payment. But the hospitals need this money desparately.

THE COURT: That seems to me to be a double-ended argument, Mr. Imberman, not that I think it goes against you for that reason, but if they need it desparately, isn't that evidence of the very concern that Mr. Fine indicates?

MR. IMBERMAN: I am delighted that he has concern for the hospitals, but the fact of the matter is no matter which way you look at it the State of New York has been dragging its heels and not making these payments when they should be made.

THE COURT: Let's distinguish between the State of New York, perhaps, and I'm not endorsing Mr. Imberman's argument, deliberately adopting a policy that they are not going to pay out a nickel which they do not have to pay out, which is their prerogative, and they are doingit by legislation, and it is a problem which is one that the individuals concerned are proceeding in bad faith, which I do not find, but as I understand your position, it is --

Mr. O'Connor, I would like to ask you this:

I know that at the last meeting you stated, when I asked you on the record, that it was the position of the Department that their approval was not -- did not have retroactive effect.

I do not know that I asked you what the basis of your statement was, or who said so or whether it was based in law or whether it was just that they did not mean to -- it was not their intention to approve retroactively.

What is the basis of it as you understand it, what is the source of it and what is the authority for it?

MR. O'CONNOR: This first came up specifically at the oral argument in the Court of Appeals.

THE COURT: I know that.

MR. O'CONNOR: Following that we preferred not to make any statement at that particular time, we talked about it outside among the other counsel. But since it came up, I checked with the regional counsel and came up with the position which we articulated two days later. We wanted to make sure we knew what we were talking about. In those two days -- when I say it is our position, what I am saying is there is no legal basis for this particular regulation to be retroactive.

Mr. Fine says that he is going to come up with a good argument. Frankly, I don't know what his argument is going to be. It is not a question of policy. It is a question of we just don't think under the regulations and the law as it stands that this regulation under the law can be retroactive.

And that is based, though I don't have the regulations with me, your Honor, it is based upon the two regulations that you specifically mentioned in your-- in the dictating of your decision in your chambers.

At the time we were talking about whether something was approvable. Or whether it had to have prior approval.

Based upon those same regulations and nothing contrary has come to my attention, based upon those regulations that are in the decision that are mentioned there, the decision of the Department of Health, Education and Welfare in the in-patient area has to be -- the decision to approve has to be prior to the implementation, so if the decision to approve has to be prior to the implementation, and then in this particular case -- when I say our position is, our legal argument is there is no legal way for it to be retroactive.

THE COURT: Without meaning to prejudge Mr. Fine's position, I say that I understand now what the positio of the Department is, and that at least, I may as well say so openly, of course it is consistent with the rationale that I articulated --

MR. FINE: I am hoping to persuade your Honor from changing your mind.

THE COURT: I know that. The question is what to do about the other issue in its relationship.

MR. FINE: May I interrupt just one moment to say this?

Your Honor's order was signed either July 29th or August the 1st --

MR. IMBERMAN: It was submitted on July 30th. That's when it was signed.

MR. FINE: On July 30th. This is now September 14th. I submit that the claim made that the state has been dragging its feet -- I don't mean me personally, but state officials generally have been dragging their feet is obviously not so.

They have within the past six weeks, roughly, had to recompute all of these hospital rates. They have done so during a period when they were hit by vacations, when their forces were not large, when they were hit with a Labor Day weekend, and they did the job as quickly as they could.

MR. IMBERMAN: Will the state pay interest?

MR. FINE: Of course not.

MR. IMBERMAN: Of course not. May I for the record address myself very briefly to Mr. Fine's first point?

THE COURT: I would like to comment on the Issue No. 2, if I may. That is the question of whether the state should make payments before my decision or await my decision.

The matter, it seems to me, is too significant for me to shoot from the hip just on the basis of your discussion this afternoon.

It is apparent that the state even as of this moment is not yet in a position to make payments so we have, I guess, several days at least --

MR. FINE: I think the director of the budget will act quickly.

THE COURT: I will be prepared to decide this issue next Monday or Tuesday. I invite all of you to submit to me letters setting forth your position and the other points that you may have overlooked today. Don't have briefs, you see, because it is not that complicated. It is a question of purely discretion, and I will give it my earnest attention as soon as I hear from you.

I would like to have those letters no later than Monday noon.

On the question of the director of the budget.

MR. IMBERMAN: I think for the first time since this case has been before your Honor Mr. Fine has raised the point of the power of the director of the budget, in effect to nullify your Honor's ruling under the claim that the state can't afford it.

I had not known that Mr. Fine was going to make this argument today, and I'm not fully prepared to answer it, but I can say just speaking off on the basis of recollection -- of course the matter has come up in other context, but I think the argument is totally impermissible in this context.

The Medicaid statute, Social Security, says in effect that if a state wishes to be in the Medicaid plan, and to get contributions from the federal government, and it must create a state plan which provides for the payment of reasonable costs to the hospitals, and what Mr. Fine is in effect saying is the director of the budget can nullify that entire concept merely on his ipso dixit that the state can't afford it.

This I think is impermissible. Nor can he overrule your Honor's order by saying, I'm sorry Judge, the state can't afford it.

In the Catholic Medical Center case the Second Circuit had precisely that issue before it some five or six years ago because there there was a freeze at the time of Medicaid payments; the argument was made that the state couldn't afford to pay any more, the costs were rising too rapidly.

The Court of Appeals invited HEW's comments, and it did get the comments that the state was just wrong and the Court of Appeals in effect said that it is no answer -- I mean, if you want to be in the Medicaid plan and get the benefit of federal government financing, you have to pay reasonable costs to the hospitals. Of course, you can step out of the Medicaid plan if you so choose.

MR. FINE: For all I know, that may be the determination of the director of the budget.

MR. IMBERMAN: I doubt very much whether he has the power to make that judgment.

THE COURT: I won't rule. It was implied in the question that I put to Mr. Fine earlier today in the discussion at that time, it was implied -- I find it hard to understand how the state can legislate in what would appear on its face anyway to be in derrogation of what I understand to be the obligations of the state under

bsjw 11

the --

MR. FINE: If the state can't afford to pay what the new rates call for, what the director of the budget will say to the Commissioner of Health about them I don't know.

I am simply saying that he may say, we think that you are -- remember, these are projections, he may say we think your projections of costs are excessive.

THE COURT: I appreciate your bringing to our attention another possible obstacle that may arise during the course of the litigation --

MR. FINE: This didn't arise before because up to now we didn't have to deal with new rates.

THE COURT: If it was put before me on the basis of an argument by the Attorney General of the State that if the budget director turns this down that is sort of the end of it --

MR. FINE: I'm not saying that is the end of it.

THE COURT: Thank you for coming in.

(Time noted: 5:00 p.m.)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COPY OF THE WITHIN PAPER
RECEIVED
DEPARTMENT OF LAW
SEP 20 1976
NEW YORK CITY OFFICE
ATTORNEY GENERAL

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., MISERICORDIA HOSPITAL MEDICAL CENTER, BUFFALO GENERAL HOSPITAL, THE GENESEE HOSPITAL, and THE MOUNT SINAI HOSPITAL on behalf of themselves and all other nonprofit hospitals which are members of the HOSPITAL ASSOCIATION OF NEW YORK STATE, INC. and which are reimbursed for Medicaid services rendered to hospital patients,

Plaintiffs,

-against-

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, ROBERT P. WHALEN, as Commissioner of Health of the State of New York, PETER GOLDMARK, as Director of the Budget of the State of New York, HUGH L. CAREY, as Governor of the State of New York, and F. DAVID MATHEWS, as Secretary of the U.S. Department of Health, Education & Welfare,

Defendants.

76 Civ. 2027

CLASS ACTION
SECOND AMENDED
COMPLAINT
(MEJ.)

Plaintiffs, by their attorneys Proskauer Rose Goetz & Mendelsohn, for their Second Amended Complaint, respectfully allege:

PRELIMINARY STATEMENT

1. This is a class action for preliminary and permanent injunctive relief and a declaratory judgment brought by the Hospital Association of New York State, Inc., ("HANYS"), located in Albany, New York; Misericordia Hospital Medical Center ("Misericordia"), located in New York City; Buffalo General Hospital ("Buffalo"), located in Buffalo, New York; The Genesee Hospital ("Genesee"), located in Rochester, New York and The Mount Sinai Hospital ("Mount

Sinai"), located in New York City on behalf of themselves and the nonprofit voluntary and public hospital members of the Association rendering hospital services on or after January 1, 1976 to patients under the joint federal and state medical assistance program provided for under title XIX of the Social Security Act, 42 USC §1396 et seq. ("Medicaid Program"). These nonprofit hospitals comprise the Class herein.

2. On January 1, 1976, defendants Philip L. Toia, Robert P. Whalen, Peter Goldmark and Hugh L. Carey ("State Defendants") imposed a freeze on Medicaid hospital reimbursement rates in the State of New York. Under this freeze, the members of the Class were paid their 1975 Medicaid rates for the 1976 Medicaid services which they provided. The 1975 rates had been calculated by the State Defendants as reimbursement for the hospitals' 1975 reasonable costs. The general inflationary movement of the economy has caused an increase in the costs of providing hospital services so that these costs are substantially higher in 1976 than they were in 1975. Thus, these frozen 1976 rates, which represented reimbursement of 1975 reasonable costs, did not reimburse hospitals for their 1976 reasonable costs. Because the freeze has never been approved as part of the New York State Plan for Medical Assistance ("State Plan") by the Secretary of the United States Department of Health, Education and Welfare ("Secretary"), and because it precludes reimbursement of hospitals' reasonable costs, it violates title XIX of the Social Security Act, 42 USC§§1396-1396i ("Medicaid Act").

3. On July 1, 1976, the State Defendants ended the freeze and issued Medicaid hospital reimbursement rates.

These new 1976 rates were calculated on the basis of methods and standards which, like the freeze, had not been approved as part of the State Plan.

4. On August 16, 1976, the Secretary approved certain of the methods and standards used by the State Defendants in the calculation of the hospital reimbursement rates issued by the State Defendants on July 1, 1976. Like the freeze, these approved methods and standards deny hospitals reasonable cost reimbursement for services rendered Medicaid patients.

5. If the methodologies adopted by the State Defendants for the calculation of hospital reimbursement rates continue in effect, the ability of the New York hospitals to provide the quality health services now made available to all the people of this State will be destroyed. The ultimate result will be to frustrate rational health planning and development in New York and, in contravention of the Medicaid Act, limit the availability of hospital services to Medicaid patients.

6. By denying the hospitals reimbursement for the reasonable costs of providing necessary health and hospital services to Medicaid patients, the State Defendants have violated and will continue to violate the Medicaid Act and Regulations, Article VI of the United States Constitution, the Fourteenth Amendment to the United States Constitution, the New York Public Health Law, the New York State Executive Law, and the New York State Social Services Law. Defendant Mathews is in violation of the Medicaid Act and Regulations and the Fifth Amendment to the United States Constitution by failing to insure the State Defendants' compliance with

the Medicaid Act and Regulations, and by approving certain regulations adopted by the State Defendants in their calculation of Medicaid hospital reimbursement rates.

PLAINTIFFS

7. Plaintiff HANYS is a New York not-for-profit corporation composed of approximately 300 nonprofit voluntary and public hospitals and other health care institutions in this State. It is organized for the purpose of providing administrative and legal assistance to nonprofit hospitals in New York State. Its principal place of business is 15 Computer Drive West, Albany, New York.

8. Plaintiff Misericordia is a nonprofit New York corporation which provides in-patient and out-patient hospital services to Medicaid-eligible patients. Its principal place of business is 600 East 233rd Street, Bronx, New York.

9. Plaintiff Buffalo is a nonprofit New York corporation which provides in-patient and out-patient hospital services to Medicaid-eligible patients. Its principal place of business is 100 High Street, Buffalo, New York.

10. Plaintiff Genesee is a nonprofit New York corporation which provides in-patient and out-patient hospital services to Medicaid-eligible patients. Its principal place of business is 224 Alexander Street, Rochester, New York.

11. Plaintiff Mount Sinai is a nonprofit New York corporation which provides in-patient and out-patient hospital services to Medicaid-eligible patients. Its principal place of business is Fifth Avenue and 100th Street, New York, New York.

DEFENDANTS

12. Defendant Philip L. Toia or his predecessor in office is, and at all times relevant hereto was, the Commissioner or Executive Deputy Commissioner of Social Services of the State of New York ("Commissioner of Social Services"). The New York State Department of Social Services is the single state agency designated pursuant to the Medicaid Act and Regulations, the New York State Plan for Medical Assistance and the New York State Social Services Law to administer or supervise the administration of the medical assistance program under the Medicaid Act. In implementing the challenged reimbursement methodologies, defendant Toia acted, and is acting, under color of law of the State of New York and contrary to the Constitution and laws of the United States.

13. Defendant Robert P. Whalen is, and at all times relevant hereto was, the Commissioner of Health of the State of New York ("Commissioner of Health"). In implementing the challenged reimbursement methodologies, defendant Whalen has acted, and is acting, under color of law of the State of New York and contrary to the Constitution and laws of the United States.

14. Defendant Peter Goldmark is, and at all times relevant hereto was, the Director of the Budget of the State of New York ("Director"). In implementing the challenged reimbursement methodologies, defendant Goldmark has acted, and is acting, under color of law of the State of New York and contrary to the Constitution and laws of the United States.

15. Defendant Hugh L. Carey is, and at all times relevant hereto was, the Governor of the State of New York ("Governor") and as such vested with the executive power of the State. In implementing the challenged reimbursement methodologies, defendant Carey has acted, and is acting, under color of law of the State of New York and contrary to the Constitution and laws of the United States.

16. Defendant F. David Mathews is, and at all times relevant hereto was, the Secretary and/or Acting Secretary of the United States Department of Health, Education and Welfare and is the federal officer ultimately responsible for the lawful administration of the Medicaid Program.

JURISDICTION AND VENUE

17. This action arises under the Medicaid Act, 42 USC §§1396-1396i, and the regulations promulgated thereunder, 42 USC §1983; the Administrative Procedure Act, 5 USC §701 *et seq.*; Article VI of the United States Constitution; the Fifth and Fourteenth Amendments to the United States Constitution; the New York State Constitution; the New York State Public Health Law; the New York State Executive Law; and the New York State Social Services Law.

18. Jurisdiction is vested in this Court under 28 USC §§1331, 1343, 1361, 2201 and 2202, 42 USC §1396a(g) and principles of pendent jurisdiction. The amount in controversy exceeds the sum of $10,000 exclusive of interest and costs.

19. Venue lies in this District pursuant to 28 USC §1391.

CLASS ACTION ALLEGATIONS

20. Plaintiffs bring this action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure on behalf of themselves and all other nonprofit hospital members of HANYS rendering hospital services to Medicaid patients on or after January 1, 1976. The Class is so numerous that joinder of all members is impractical. Upon information and belief, there are approximately 275 hospitals in the Class. There are questions of law and fact common to the Class, including whether certain reimbursement methodologies applied to the calculation of hospital reimbursement rates that have been promulgated and implemented by the State Defendants, some of which have been approved by the Secretary, are in violation of the Medicaid Act and Regulations, Article VI of the United States Constitution, the Fifth and Fourteenth Amendments to the United States Constitution, the New York State Constitution, the New York State Public Health Law, the New York State Executive Law and the New York State Social Services Law. Plaintiffs will fairly and adequately protect the interests of the Class. Defendants have acted and have refused to act on grounds generally applicable to the Class, thereby making injunctive and declaratory relief with respect to the Class appropriate.

STATEMENT OF FACTS

21. The United States provides funds to a state which is funding and administering, in accordance with law, a state plan approved by the Secretary for the provision of medical assistance to certain categories of low income and indigent persons. This joint federal-state program is

known as the Medicaid Program, and is governed by the Medicaid Act and Regulations promulgated thereunder.

22. Under the Medicaid Act and Regulations, the methodologies for the calculation of in-patient and out-patient Medicaid hospital reimbursement rates must be part of a state's approved state plan.

23. Under the Medicaid Act and Regulations, a state Medicaid plan must provide for payment to hospitals of the reasonable cost of in-patient hospital services rendered Medicaid patients in accordance with methods and standards developed by the state and approved in advance of implementation by the Secretary. Pursuant to the Medicaid Act and Regulations, changes cannot be made in these methods and standards without the prior approval of the Secretary. The Medicaid Regulations, 45 C.F.R. §250.30, further provide that the reasonable cost of in-patient hospital services shall be determined in accordance with the standards and principles for ascertaining reasonable cost under the Medicare Act, title XVIII of the Social Security Act, 42 USC §§1395-1395pp (with an exception not relevant hereto) or under an alternate method which has been approved in advance by the Secretary.

24. A reimbursement methodology for the determination of reasonable cost other than that provided for under Medicare must give "[a]ssurance of adequate participation of hospitals and availability of hospitals services of high quality to title XIX [Medicaid] recipients." 45 C.F.R. §250.30(a)(2)(ii)(d).

25. The New York State Social Services Law provides that the New York State Department of Social Services "shall submit a plan for medical assistance, as required by . . . [the Medicaid Act] to the federal department of health, education and welfare for approval pursuant to the provisions of such law and shall act as the single state agency to supervise the administration of the plan in this state." Social Services Law §363-a(1). New York State participates in the Medicaid program under a state plan, which was amended on August 16, 1976, and which was prepared by the New York State Department of Social Services.

26. The New York State Plan ("State Plan"), both before and after the August 16, 1976 amendments, states that

> "As a condition for receipt of Federal funds under title XIX of the Social Security Act, the New York State Department of Social Services . . . agrees to administer the program in accordance with the provisions of . . . [the] State plan, the requirements of title XIX of the Act, and all applicable Federal regulations and other official issuances of the Department."
> Preface to Section I.

27. On March 30, 1976, the Commissioner of Social Services executed an amendment to the State Plan pursuant to 42 USC §1396a(g) consenting to suits in federal court by or on behalf of providers of in-patient hospital services with respect to payment of reasonable costs of such services and waiving any immunity from such suits under the Eleventh Amendment to the United States Constitution or otherwise.

28. Pursuant to the Medicaid Act and Regulations, the State Plan includes in-patient and out-patient hospital services among the services which will be provided to eligible Medicaid patients.

29. The State Plan, both before and after the August 16, 1976 amendments, sets forth methodologies for the calculation of in-patient and out-patient Medicaid hospital reimbursement rates.

30. From January 1, 1976 through June 30, 1976, the State Defendants froze reimbursement rates for in-patient and out-patient hospital services rendered Medicaid patients at their 1975 levels. This freeze was never approved by the Secretary, and was in violation of the methodologies for the calculation of in-patient and out-patient hospital reimbursement rates contained in the State Plan both before and after the August 16, 1976 amendments.

31. On July 1, 1976, the State Defendants issued new in-patient and out-patient hospital reimbursement rates for Medicaid services rendered by members of the Class, purporting to cover the period January 1, 1976 through December 31, 1976. These in-patient and out-patient rates were calculated in accordance with certain new methods and standards which were not part of the pre-August 16, 1976 State Plan.

32. For more than one-third of the members of the Class, the July 1, 1976 in-patient rates are lower than the rates which the State Defendants calculated as reimbursement for these hospitals' 1975 reasonable costs. For the entire Class, the July 1, 1976 out-patient rates are either lower than or the same as the hospitals' 1975 out-patient rates. As a result of the inflation to which the entire economy has been subjected, the hospitals' reasonable cost of providing in-patient and out-patient hospital services to Medicaid patients has been, and is, greater in 1976 than it was in 1975.

Thus, paying a hospital in 1976 at a rate which is less than or the same as its 1975 rate necessarily results in the hospital receiving less than its reasonable cost.

33. On August 16, 1976, the Secretary approved certain, but not all, of the changes in the methodologies for the reimbursement of in-patient and out-patient hospital services submitted by the State Defendants, and incorporated them into the State Plan. These approved changes, individually and in the aggregate, have altered the State Plan so greatly that it no longer provides for reasonable cost reimbursement for Medicaid hospital services. Several of these changes are contained in 10 NYCRR §§86.8(d), 86.8(f), 86.13(c), 86.14(b), 86.14(e), 86.15(b), 86.21(i), 86.21(k) and 86.31.

Ceilings

34. 10 NYCRR §§86.13(c), 86.14(b), 86.14(e) and 86.21(k) impose a series of arbitrary ceilings on the amount of reimbursement which will be paid a hospital for rendering Medicaid in-patient hospital services. 10 NYCRR §86.21(imposes an additional arbitrary ceiling on the amount of reimbursement which will be paid a hospital for rendering Medicaid in-patient and out-patient hospital services. 10 NYCRR §§86.13(c), 86.14(b), 86.14(e) and 86.21(k) exclude from a hospital's in-patient and out-patient reimbursement rates part of the reasonable cost incurred by it in treating Medicaid patients.

Disallowance of Equipment Costs

35. 10 NYCRR §86.15(b) excludes from in-patient and out-patient hospital reimbursement rates inflationary increases in certain costs, such as costs of equipment leases. The failure to include such cost increases denies the hospitals reimbursement for reasonable costs.

Disallowance of Governmental and Judicial Costs

36. 10 NYCRR §86.21(i) excludes from in-patient and out-patient hospital reimbursement rates certain reasonable costs, such as interest, incurred as a result of governmental or judicial action.

Overpayments

37. 10 NYCRR §§86.8(d) and 86.31 violate the basic requirement of due process by denying a hospital an adequate opportunity to contest a determination by the Commissioner of Health that an overpayment has been made to the hospital.

Interest

38. 10 NYCRR §§86.8(f) and 86.31 exclude from a hospital's in-patient and out-patient reimbursement rates reimbursement for a portion of the hospital's reasonable costs by deducting from these reimbursement rates an amount equal to 7% of any overpayments resulting from (a) a prior rate revision by the State Defendants or (b) a finding by the State Defendants that the hospital has terminated a service. In violation of due process, the hospital has no adequate opportunity to contest the imposition of this interest penalty. The State Plan as amended on August 16, 1976 does not provide for the imposition of interest on the State Defendants if they fail to adequately reimburse a hospital for its reasonable costs.

Penalties

39. 10 NYCRR §§86.8(f) and 86.31 exclude from a hospital's in-patient and out-patient reimbursement rates

reimbursement for a portion of the hospital's reasonable costs by deducting from these reimbursement rates penalties, imposed by the Commissioner of Health, if a finding is made that the hospital has incorrectly completed reports, failed to file required revisions thereof or terminated a service. In violation of due process, the hospital has no adequate opportunity to contest the imposition of these penalties. These regulations further violate due process since the conduct which they proscribe is only vaguely and generally described, and the Commissioner of Health has almost unlimited discretion as to the amount of penalty to be imposed under them.

Termination of Services

40. The operation of 10 NYCRR §86.31 will have the effect of requiring hospitals to continue providing in-patient and out-patient services for which they are not receiving reasonable cost reimbursement.

Inadequate Appeal System

41. The State Plan, as amended on August 16, 1976, does not provide for an adequate appeal system conforming to standards of due process under which hospitals can seek and obtain review and correction of in-patient and out-patient reimbursement rates which do not reimburse the hospitals for the reasonable cost of services rendered Medicaid patients or otherwise do not conform to law.

Disallowance of Interns and Residents Costs

42. The State Defendants have submitted to the Secretary for his approval a proposed amendment to the

State Plan which is contained in 10 NYCRR §86.26. This regulation would deny hospitals reimbursement for part of their reasonable costs by automatically disallowing 10% of the cost of salaries and fringe benefits for interns and residents from the calculation of in-patient and out-patient hospital reimbursement rates. The State Defendants have implemented this regulation in the calculation of 1976 reimbursement rates for members of the Class even though this regulation has not been approved by the Secretary.

43. Pursuant to §2803 of the New York Public Health Law, regulations governing the establishment of Medicaid in-patient and out-patient hospital reimbursement rates must be adopted by the New York State Hospital Review and Planning Council ("Council"), subject to the approval of the Commissioner of Health. The Council has refused to adopt 10 NYCRR §86.26.

44. Pursuant to §101-a of the New York State Executive Law, the Temporary President of the New York State Senate and the Speaker of the New York State Assembly must be given at least 21 days prior notice of the adoption of a New York State regulation before it can become effective. This requirement applies to all regulations except those relating to the organization or internal management of an agency or those that constitute emergency measures necessary for the preservation of the public health, safety or general welfare. The Temporary President of the New York State Senate and the Speaker of the New York State Assembly never received 21 days notice prior to the State Defendants' adoption of 10 NYCRR §86.26. This regulation does not relate to the organization or internal management of an agency,

nor is 10 NYCRR §86.26 an emergency measure necessary for the preservation of the public health, safety or general welfare.

Retroactivity

45. In the calculation and payment of Medicaid in-patient and out-patient reimbursement rates, the State Defendants have applied and will continue applying, retroactively to January 1, 1976, the August 16, 1976 State Plan amendments and 10 NYCRR §86.26. These amendments were not part of the State Plan prior to August 16, 1976. The members of the Class relied on the reimbursement methodologies in the approved State Plan in effect from January 1 through August 15, 1976 when rendering these hospital services to Medicaid patients during this period. If the members of the Class are not reimbursed for these services in accordance with the State Plan in effect prior to August 16, 1976, they will be deprived of their property without due process of law and be denied reasonable cost reimbursement.

Out-Patient Rate Ceilings

46. Chapter 76 of the Laws of 1976 of the State of New York, adopted March 30, 1976, imposes a ceiling on the out-patient hospital reimbursement rates for Medicaid services rendered by members of the Class during the period January 1, 1976 through March 31, 1977. The ceiling imposed on a hospital's rate for this period is the hospital's approved 1975 Medicaid out-patient rate. This ceiling has never been approved by the Secretary as part of the State Plan and, in fact, has never even been submitted to him.

47. The 1975 Medicaid rates for out-patient hospital services were calculated in advance of 1975 on the basis of 1973 allowable costs for such services which were then adjusted to account for inflationary cost increases expected to occur prior to and during 1975. The reasonable cost to each of the members of the Class for the delivery of out-patient hospital services to Medicaid patients is greater in 1976 than it was in 1975, and is less than the maximum rate allowed under the Medicaid Act and Regulations, namely, the reasonable customary charge. Thus, using 1975 rates as ceilings on rates for reimbursing 1976 out-patient hospital services necessarily results in the members of the Class receiving less than their reasonable costs.

Medical Care Advisory Committee

48. The Medicaid Regulations, 45 C.F.R. §246.10 (a)(3) require that an approved state plan provide for a medical care advisory committee which "will have adequate opportunity for meaningful participation in policy development and program administration, including the furtherance of recipient participation in the program of the agency." The State Plan provides for a Medical Advisory Committee in accordance with 45 C.F.R. §246.10. Section 365-c(2) of the New York State Social Services Law provides that the Medical Advisory Committee "shall advise the commissioner [of Social Services] with respect to [Medicaid] health and medical care services" and requires that the Committee meet at least once a year. The Medical Advisory Committee has not met within the past year, and was not consulted about the adoption or implementation of the August 16, 1976 amendments to the State Plan, 10 NYCRR §86.26, or the ceiling on out-patient rates.

Obligation to Provide Services

49. The New York Public Health Law requires hospitals in New York State to provide certain in-patient and out-patient hospital services. Pursuant to this statute, the members of the Class are obligated to provide certain hospital services to Medicaid-eligible patients. As a result of the August 16, 1976 amendments to the State Plan, 10 NYCRR §86.26, and the outpatient rate ceilings, the members of the Class will be reimbursed less than the reasonable cost of providing these services which they are required by law to furnish.

Availability of Services

50. Pursuant to the Medicaid Act and Regulations and the State Plan, in-patient and out-patient hospital services are supposed to be made available under the Medicaid Program to all Medicaid-eligible patients. As a result of the August 16, 1976 amendments to the State Plan, 10 NYCRR §86.26 and the out-patient rate ceilings, many of these patients will be unable to obtain these hospital services because of the adverse financial impact of these regulations on the members of the Class. For example, at least 169 of the hospitals have been adversely affected by 10 NYCRR §86.14(b) and at least 103 by 10 NYCRR §86.26.

51. Under the Medicaid Regulations, 45 C.F.R. §250.30(a)(6), a state plan must provide for rates

> "which are designed to enlist participation of a sufficient number of providers of services in the [Medicaid] program so that eligible persons can receive the medical care and services included in the plan at least to the extent these are available to the general population."

At present, the out-patient departments of the members of the Class are the only source of the medical care and services provided for in the State Plan for a substantial number of Medicaid-eligible persons. If the use of the 1975 rate ceilings on 1976 Medicaid out-patient hospital reimbursement rates continues, many of these patients will be unable to obtain these services from members of the Class, with the result that these services will not be available to these patients to the extent they are available to the general population.

STATUTORY CLAIMS

52. The State Defendants have violated and continue to violate the Medicaid Act and Regulations and the State Plan in effect both before and after August 16, 1976 by applying methods and standards in the calculation and payment of reimbursement rates for in-patient and out-patient hospital services rendered Medicaid patients in 1976 that were not in the approved State Plan in effect at the time the services were rendered.

53. The methods and standards used by the State Defendants in the calculation of the 1976 Medicaid in-patient hospital reimbursement rates, including the State Plan as amended on August 16, 1976, and 10 NYCRR §86.26, violate the Medicaid Act and Regulations, the New York Public Health Law and the New York Social Services Law because they arbitrarily deny hospitals the reimbursement of the reasonable cost of in-patient hospital services rendered Medicaid patients.

54. The methods and standards used by the State Defendants in the calculation of the 1976 Medicaid out-patient hospital reimbursement rates, including the State Plan as amended on August 16, 1976, and 10 NYCRR §86.26, violate the New York Public Health Law because they arbitrarily deny hospitals the reimbursement of the reasonable cost of out-patient hospital services rendered Medicaid patients.

55. The methods and standards used by the State Defendants in the calculation of 1976 Medicaid in-patient and out-patient hospital reimbursement rates, including the State Plan as amended on August 16, 1976, 10 NYCRR §86.26, and the out-patient rate ceilings imposed by Chapter 76 of the Laws of 1976 of the State of New York, violate the Medicaid Act and Regulations since they will result in the availability of in-patient and out-patient hospital services to eligible patients being reduced below legally required levels.

56. The methods and standards used by the State Defendants in the calculation of 1976 Medicaid in-patient and out-patient hospital reimbursement rates, including the State Plan as amended on August 16, 1976, 10 NYCRR §86.26, and the out-patient rate ceilings imposed by Chapter 76 of the Laws of 1976 of the State of New York, violate the Medicaid Act and Regulations and the New York State Social Services Law in that they were adopted without prior consultation with the Medical Advisory Committee.

57. The implementation of 10 NYCRR §86.26 violates the New York State Public Health Law since this regulation has never been adopted by the Council.

58. The implementation of 10 NYCRR §86.26 violates the New York State Executive Law since due notice of this regulation has never been given to the Temporary President of the New York State Senate and the Speaker of the New York State Assembly.

CONSTITUTIONAL CLAIMS

59. The calculation and payment of the Class' 1976 Medicaid in-patient and out-patient hospital reimbursement rates violates the Supremacy Clause of the United States Constitution, Article VI, because this was done in accordance with a state law, and regulations which have the effect of state law, in conflict with the laws of the United States on the same subject.

60. The methods and standards used by the State Defendants in the calculation and payment of 1976 Medicaid in-patient and out-patient hospital reimbursement rates, including the State Plan as amended on August 16, 1976, 10 NYCRR §86.26, and the out-patient rate ceilings imposed by Chapter 76 of the Laws of 1976 of the State of New York, violate the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and the New York State Constitution insofar as they have the effect of depriving the members of the Class of reasonable cost reimbursement when they provide in-patient and out-patient hospital services to Medicaid patients.

61. The implementation of amendments to the State Plan violates Article I, Section 10 of the United States Constitution insofar as these amendments are retroactively applied to reduce reimbursement for in-patient or out patient

hospital services provided Medicaid patients prior to the date on which the amendments were approved by the Secretary. This is because the retroactive application of these amendments impairs contractual obligations between plaintiffs and the State of New York.

62. By imposing out-patient rate ceilings, Chapter 76 of the Laws of 1976 of the State of New York violates Article I, Section 10 of the United States Constitution because it impairs contractual obligations between plaintiffs and the State of New York.

63. The implementation of amendments to the State Plan violates the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and the New York State Constitution insofar as these amendments are retroactively applied to reduce reimbursement for hospital services provided Medicaid patients below the level that would have been paid the members of the Class under the State Plan in effect prior to the date on which these amendments were approved by the Secretary.

64. By imposing out-patient rate ceilings, Chapter 76 of the Laws of 1976 of the State of New York violates the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and the New York State Constitution insofar as these ceilings are retroactively applied to reduce reimbursement for out-patient hospital services provided Medicaid patients below the level that would have been paid the members of the Class under the State Plan in effect prior to the enactment of Chapter 76.

65. The implementation of 10 NYCRR §86.26 violates the due process clause of the Fourteenth Amendment to the United States Constitution since this regulation has been adopted in violation of plaintiffs' procedural due process rights.

66. Plaintiffs have no adequate remedy at law.

67. The members of the Class have suffered and will continue to suffer irreparable injury unless they are reimbursed the reasonable cost of in-patient and out-patient hospital services rendered to Medicaid patients.

WHEREFORE, Plaintiffs pray:

(a) That this Court preliminarily enjoin the State Defendants and their successors, officers, agents, servants, employees and attorneys from reimbursing any plaintiff or member of the Class for Medicaid services rendered on or after January 1, 1976 at an in-patient or out-patient hospital rate which is less than its 1975 rate;

(b) That this Court preliminarily and permanently enjoin the State Defendants and their successors, officers, agents, servants, employees and attorneys from promulgating or applying any amendment to the State Plan which would authorize reimbursement for hospital services rendered Medicaid patients at less than reasonable cost;

(c) That this Court issue an injunction ordering the State Defendants and their successors, officers, agents, servants, employees and attorneys to comply with all federal laws and rules and regulations of the United States Department of Health, Education and Welfare applicable to the New York Medicaid Program, including reimbursement on the basis of reasonable cost, so long as the State of New York continues to participate in the federal Medicaid Program;

(d) That this Court declare and adjudge that the amendments to the State Plan approved by the Secretary on August 16, 1976 and 10 NYCRR §86.26 are unlawful;

(e) That this Court declare and adjudge that the imposition of rate ceilings on out-patient hospital reimbursement rates for services rendered Medicaid patients on or after January 1, 1976 by Chapter 76 of the Laws of 1976 of New York is unlawful;

(f) That this Court permanently enjoin the State Defendants and their successors, officers, agents, servants, employees and attorneys from applying or attempting to apply the amendments to the State Plan approved by the Secretary on August 16, 1976 and 10 NYCRR §86.26 to any hospital reimbursement rate for services rendered Medicaid patients on or after January 1, 1976;

(g) That this Court permanently enjoin the State Defendants and their successors, officers, agents, servants, employees and attorneys from applying or attempting to apply the rate ceilings on out-patient hospital reimbursement rates for services rendered Medicaid patients on or after January 1, 1976 contained in Chapter 76 of the Laws of 1976 of New York;

(h) That this Court enjoin Defendant Mathews and his successors, officers, agents, servants, employees and attorneys from approving any amendment to the State Plan which would provide for the reimbursement of hospital services rendered Medicaid patients at less than reasonable cost and order him to revoke his August 16, 1976 approval of amendments to the State Plan; and

(i) That this Court order Defendant Mathews to exercise his authority and compel the State Defendants to comply with the Medicaid Act and Regulations.

AND, that Plaintiffs be awarded their costs and such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
September 17, 1976

PROSKAUER ROSE GOETZ & MENDELSOHN

By Jacob Imberman
Jacob Imberman
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
--------------------------------------X

9/28/76

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., MISERICORDIA HOSPITAL MEDICAL CENTER, BUFFALO GENERAL HOSPITAL, THE GENESEE HOSPITAL, and THE MOUNT SINAI HOSPITAL on behalf of themselves and all other nonprofit hospitals which are members of the HOSPITAL ASSOCIATION OF NEW YORK STATE, INC. and which are reimbursed for Medicaid services rendered to hospital patients,

Plaintiffs,

76 Civ. 2027

-against-

MEMORANDUM

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, ROBERT P. WHALEN, as Commissioner of Health of the State of New York, PETER GOLDMARK, as Director of the Budget of the State of New York, HUGH L. CAREY, as Governor of the State of New York, and DAVID MATHEWS, as Secretary of the U.S. Department of Health, Education & Welfare,

Defendants.
--------------------------------------X

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LASKER, D.J.

On August 2, 1976, judgment of the court was entered declaring certain amendments to New York State's regulations governing the rates of reimbursement to voluntary hospitals for services rendered under the Medicaid Program to be invalid until approved by the Department of Health, Education and Welfare under 42 U.S.C. §1396 et seq. A stay was granted for purposes of appeal and the State appealed.

On the day prior to argument of the appeal, the Department of Health, Education and Welfare approved two of the three amending regulations which this court had theretofore declared invalid. The Department has not yet approved the third amendment. At argument before the Court of Appeals the State contended that the effect of the Department's approval of the two amendments was retroactive to January 1, 1976. The plaintiffs and the United States disagreed. Without deciding the appeal, the Court of Appeals remanded the matter to this court for a determination of the question of retroactivity. That matter is now pending before the court, returnable October 6, 1976 ~~September 29th~~.

The judgment of August 2, 1976 required:

> "That the State Defendants and their successors, officers, agents, servants and employees promptly recompute and pay reimbursement rates for in-patient Medicaid services rendered on and after January 1, 1976 in accordance with the approved New York State Plan and that until such recomputation

> and payment is complete that they continue to pay the plaintiffs and the members of the class the rates promulgated by the State defendants on July 1, 1976."

The State has advised the court that it has completed the computations necessary to enable it to make payments to the plaintiff hospitals in accordance with the quoted requirement of the judgment. However, the State now moves for a stay of those provisions of the judgment until determination by this court of the pending issue of retroactivity. The plaintiffs oppose the motion. The United States Government has expressed no view.

Plaintiffs argue that the probabilities are that they will succeed on the merits of the retroactivity issue; that they will suffer irreparable injury during the period of any stay; that no other interested persons will suffer substantial harm and that it is in the public interest that payments be made to the hospitals at the old (and generally higher) rate.

The State counters that it should not be required to make the higher payments (estimated to amount to between $20 and $45 million) until the question of retroactivity has been determined; that if the State prevails payments in excess will have to be recouped from the hospitals; that past recoupments on account of overpayments have in some cases caused serious financial burdens to hospitals or resulted in non-collectibility and that the process of recoupment would impose the possibly unnecessary expense of recalculation and renotification on the State.

Without prejudging the issue of retroactivity which has not yet been fully submitted to the court, we have previously expressed on the record the view that the State has a heavy burden of proof to establish that HEW's approval is retroactive in effect. Not only is approval normally presumed to be prospective, but the controlling statute and regulations provide for prior approval of any amendment to a Medicaid Plan and we have earlier held that the regulations are without effect until approved. This is not the only factor favoring plaintiffs: they have already been deprived of payments to which they were entitled because of the State's acting under regulations which had not received HEW approval. Accordingly, if the waiting period pending the determination of the retroactivity were to be great it would be inequitable to grant the State's application for a stay. In the present situation, however, the waiting period in question is short. The final briefs of the parties relating to the question of retroactivity are due ~~September 29th~~ October 6, 1975. The court will determine the matter with dispatch. To require the State to institute payments on the 1975 rate basis today and to reverse that situation should the ruling on the question of retroactivity favor the State on this motion or on appeal -- even if it be assumed that the likelihood of such a ruling may be doubted -- would produce chaotic backing and filling, and would impose the added expense of recalculation and renotification on the State which is not in a position to assume any unnecessary expense.

The grant of a stay is, therefore, appropriate subject, however, to a significant condition. Under State law monies owed by the State to the hospitals are payable without interest, while monies payable by the hospitals to the State must be paid with interest. While the State may be free to enact such legislation, nevertheless it would be inequitable in the circumstances of this case to accede to the State's request for a stay if the payment it may be called upon to make is without interest.

For the reasons stated above the State's application for a stay is granted on condition that as to any payments as to which the stay applies, such payments if hereafter required to be paid, shall be paid by the State to the plaintiff hospitals together with interest at the legal rate for the period from the date of the filing of this order to the date of payment.

It is so ordered.

Dated: New York, New York
September 28, 1976.

MORRIS E. LASKER
U.S.D.J.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., MISERICORDIA HOSPITAL MEDICAL CENTER, BUFFALO GENERAL HOSPITAL, THE GENESEE HOSPITAL, and THE MOUNT SINAI HOSPITAL, on behalf of themselves and all other nonprofit hospitals which are members of the HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., and which are reimbursed for Medicaid services rendered to hospital patients, :

Plaintiffs, :

v. : 76 Civ. 2027

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, ROBERT P. WHALEN, as Commissioner of Health of the State of New York, PETER GOLDMARK, as Director of the Budget of the State of New York, HUGH L. CAREY, as Governor of the State of New York, and DAVID MATHEWS, as Secretary of the U. S. Dapartment of Health, Education & Welfare, :

Defendants. :

--x

Before: HON. MORRIS E. LASKER,

District Judge.

New York, New York
September 28, 1976 - 4:00 p.m.

APPEARANCES:

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By: JOHN O'CONNOR, Esq.,
Assistant United States Attorney.

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(In open court)

MR. IMBERMAN: If your Honor please, the last conference that we had on this matter was September 14, 1976, exactly two weeks ago today, and at that time Mr. Fine, in reporting to your Honor on the present situation as to the hospital Medicaid in-patients, said the following, and I quote from page 3:

"Pursuant to your order, the Commissioner of Health has recomputed all of the rates to be paid to hospitals under the old Medicaid formula, that is, the formula that was in effect as of 1975 before the new regulations were promulgated. I understand, as a result of a telephone conversation today that these rates are now being certified to the Director of the Budget."

THE COURT: I recall that.

MR. IMBERMAN: The other points he said, and I quote:

"He is now transmitting the rates to the Director of the Budget."

And somewhere on page 7, I believe he said that "The process of recomputation has been completed and it is now being certified, and I should hear from the director of the budget within the next few days."

As of 2:00 o'clock this afternoon, two weeks

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later, those rates had still not been certified by the Commissioner of Health, and have still not been delivered to the Director of the Budget.

As a result, the entire process by which the defendants are supposed to comply with the order which your Honor entered just two days shy of two months ago has not been complied with. This entire process has just stopped because, for some reason, despite the fact the rates are recomputed two weeks ago, according to Mr. Fine, the people in Albany refused to do what your Honor drected.

I have no way of knowing how to cope with this. I have never in the thirty-five years I've been practicing had a situation where the order of a federal court has been, in my view -- and I say this in all seriousness -- deliberately disobeyed by a state official, and I've asked your Honor for this conference in order to call this to your HOnor's attention, and I wish to call to your Honor's attention the fact that the hospitals are suffering badly as a result of this.

I have a letter here that I would like to show to your Honor, which Miss Rosenfeld from my office received from the Director of Finance of the Genesee Hospital in Rochester, which indicates, although there has been no significant change in the hospital's volume of patients, Medicaid patients, its receipts for reimbursement for taking care of these patients in the month of September has been less than 10 percent of what it normally is, and I'm showing your Honor this letter and I've given copies when I came to both Mr. Fine and to Mr. O'Connor.

Now, when a hospital ordinarily receives $350,000 to $400,000 a month for taking care of Medicaid patients and, as of today, the 28th of September, there was no difference in the figures that are in that letter dated September 24, that hospital is going to have to close up shop or do something.

THE COURT: Without commenting on the merits of the point that you are making, I'm confused by the letter. I can see what figures it received. I don't see any figures for comparison.

MR. IMBERMAN: The figures show from January of this year to September, and it shows that in January, for example, the hospital received $425,000 and in February $480,000, and in September $25,000; and the letter says we have had no significant change.

I checked with the hospital this morning to see if they had gotten any funds and they said no. It's a desperate situation.

THE COURT: Assuming that this letter means, and that it could be proved -- of course, I don't know -- that in September the Genesse Hospital, whatever the unit of measurement is that it had in August, for example, when it received $284,000, it does seem very worrisome that it only received $25,000 in September. I don't know if we need to make an exhibit of this. I think the burden of its contents is on the record.

I'd like to see what Mr. Fine and Mr. Lefkowitz have to say.

MR. FINE: I would say were the statements made on September 14 --

MR. IMBERMAN: Yes.

MR. FINE: -- were too true as of my knowledge of that date.

THE COURT: When you say "true," do you mean that you believe they were -- that you now believe at that time they were the fact, or that you then believed in good faith they were?

MR. FINE: I believe in good faith they were the fact.

I have since learned there has been a delay in the transmittal of the certified rates to the Director of the Budget. I am also prepared to make the statement as of this moment the Director of the Budget has those certified rates, and this is true as of 3:30 this afternoon when I left my office.

THE COURT: Could you tell us who it was that gave you this information?

MR. FINE: The information is from Mr. Donovan, Assistant Counsel of the Department of Health, who told me he had ordered the rates to be hand-delivered certified by the Department of Health to the Director of the Budget, and now in possession of the Director of the Budget.

This conversation took place within the last half-hour.

THE COURT: As a result of the delay which apparently had existed, even though you believed in good faith two weeks ago --

MR. FINE: I have no explanation for the delay.

THE COURT: -- that these actions had already occurred, will the Budget Director be in a position at such time as I dispose of the issue of retroactivity to take action if he is ordered to take action, or will the Commissioner of Health, whoever is responsible to take action?

MR. IMBERMAN: The Director of the Budget is to approve the rates; that's what his function is to be.

THE COURT: What I'm trying to find out, unfortunate as the delay is and as disappointing, is to find the Attorney General, whether in good faith or not, is put in a position -- I'll say even in good faith, is put in a position by other offices of the State to represent to the Court that something has been done which has not been done. The question is whether the passage of time that has actually occurred is going to influence the situation or not.

In other words, it's one thing for me to be faced with passive or active negligence or disobedience. The order has no effect if it has no effect.

MR. FINE: I can offer,your Honor, because of continual conversation between myself and the Department of Health, to get these rates certified with the Director of the Budget -- I can offer at this moment no explanation other than that the Department of Health wanted to get some collaboration with the Department of Social Services which has to administer the rates, and they waited -- the cooperation of the Department of Social Services to transmit the rates, and they got that and transmitted the rates to the Director of the Budget.

I'd like to submit to your Honor the effect of the delay is two weeks.

When the Director of the Budget gets the rates -- he has been apprised of the situation orally, I know -- he knows all about it. As a matter of fact, Mr. Lewittes knows Mr. Goldmark is familiar with this --

THE COURT: I thought Mr. Goldmark originated the whole scheme.

MR. FINE: -- is familiar with the case, and how quickly he can act I don't know. It's one of those things. He has to locate the money.

MR. IMBERMAN: Well --

MR. FINE: Let me finish my statement.

He has to locate $20 million or $30 million, or whatever it will cost. He is also in the anomalous position to make a position because the question of activity is still up in the air.

The function of the Director of the Budget, I should like to explain to your Honor at this point, up to 1975 the public law statute simply says the Director of the Budget, after certification to him by the Commissioner of Health, shall approve the rates, or the rates should be approved by the Director of the Budget.

In 1976 his function was changed somewhat --

THE COURT: Legislatively.

MR. FINE: -- legislatively.

And I should like to call your Honor's attention to what he has to do now and what the statute now provides. I am referring to Chapter 76 of the law of 1976.

THE COURT: How bicentennial can you get?

MR. FINE: Yes.

Your Honor, I will read it, skipping the irrelevancies.

"Prior to the approval of rates of payment to hospitals, exclusive of residential health care facilities and out-patient and emergency services made by government agencies" -- that is to say by the Medicaid program -- "the State Director of the Budget shall take into consideration economic conditions within tha state which effect the economic resources which meet the resources of government-funded medicals. If economic conditions are determined by such director to be likened to have a severe adverse effect on the ability of the state government to make such resources available to purchase field care at the proposed rate, the Director shall return the proposed rates to the Commissioner and direct him to revise the rates to comply with the

Director's findings." End of quotation.

In short, your Honor, what we have here is a problem. The Director of the Budget, if you hold these rates to be retroactive, will have to find the money within the State's limited financial resources at the time.

I want to also make the observation that the same Chapter 76, paragraph 12, and Chapter 2(b) provides for a hospital rate review board, so that any hospital which feels that its 1976 Medicaid rate is improper has an appellate board set up to hear appeal on the rate determinations.

THE COURT: I would like to talk about that in a moment, unless that is the end of your remarks.

MR. FINE: I also want to add,your Honor, the following fact: This case, as you know, started off as a challenge to what, for brevity's sake, I'll refer to as a freeze on the 1976 rates.

You remember back in May or June the initial complaint challenged the fact that the 1976 rates were frozen at the 1975 level. On July 1, the State promulgated new rates, and on July 16 we were served with the first amended complaint which challenged the new rates because they were computed under a formula which included regulation which plaintiffs allege had not been approved by HEW.

THE COURT: That is only one of your complaints, the only one I ruled on.

MR. FINE: Right.

The HEW then approved those claims. On September 1 --

THE COURT: It is more accurate to say approved two of the three.

MR. FINE: Two.

On September 1, at a hearing here, they said they would send a second amended complaint. I and Mr. O'Connor said we had no objection. And your Honor, I think, granted permission.

Three weeks later they got around to serving that amended complaint which is not a greatly enlarged attack on not merely the approved regulation of HEW, but also on other aspects of the whole Part 86 formula.

I mention all these facts simply to say the issues have now grown infinitely more complex.

The State is now faced with an attack that is so broad on its whole methodology of computing the rate that the service of that complaint sort of put a stop to our thinking about how we could handle this whole

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situation.

This is, of course, no excuse, so to speak, for not complying with your Honor's order, which I assume my client will, but it gives us another dimension to the whole case. We are now confronted with -- let me refer to it as a broad attack on the whole Part 86 methodology.

Now, given these complexities, the State is in a position where it cannot figure what the Medicaid program is likely to end up costing. If your Honor should hold, despite HEW approval, the two regulations approved were unreasonable and revert to the 1975 formula for the portion of the year starting August 16, which is the date upon which HEW approved those two regulations, we are faced with another fiscal problem, and I think what is happening in Albany at this moment in time they are considering the entire overall picture.

If your Honor, for instance, determines ultimately on the merits that these regulations, despite HEW approval, are invalid, the State might have to reconsider its entire participation in this whole program. You know, I'm always amazed, the State's position is like that of a man who is induced to become a partner in a very expensive yacht. The federal government owns a printing press, it prints money; the State does not.

My point is the program may grow too rich for the State's budget. I think this is --

THE COURT: I have recognized at the outset of this case, and I say this without even having looked at the second amended complaint, that the issues that were raised here, even if only relegated to the three questions, were very profound issues on both sides, and I was skeptical from the beginning, for my part, as to whether they could be determined on the merits simply on the very good papers that we have so far, and even the very good testimony that we have so far.

I am very conscious of the gravity of this case. Having said that, Mr. Fine, I don't know what more can be said by a federal judge.

My job will obviously be to call the shots as I see them and determine whether or not the State of New York is incompliance with the federal statute or not.

One of the comforting facts of my position is the everlasting knowledge that I can always be corrected if I'm wrong, but I don't mean to sound lighthearted by saying that. I do mean that I don't think that disaster will set in. I don't suppose because of your telling me of your deep concern about the bind the

State might be in if I rule adversely you are suggesting there is anything I can do about that.

MR. FINE: I wanted you to understand. Before I conclude, sir, may I make one comment on this letter?

Over the past several months, Miss Rosenfeld, Mr. Imberman's associate, has called me about one or two mixed-up situations where apparently the local districts or counties had gotten very confused as to what they should pay.

THE COURT: I'm not surprised.

MR. FINE: I made some attempt in all sincerity to straighten them out. As a matter of fact, Miss Rosenfeld called me about this Genesee Hospital matter. It's quite obvious something happened here; I'm not sure what.

MR. IMBERMAN: I agree.

MR. FINE: I mean it has nothing to do -- my point is the drop in their income could not possibly have anything to do with the recalculations of rate.

THE COURT: Let me say I wouldn't think so, either. All that I have heard about the variations in rates, and amateur as I am in this field, it seems to me highly unlikely that a drop from $250,000 to $25,000 can be caused (a) by the change in regulation, and (b) it

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would seem the regulation would have been in effect in August, anyway.

MR. FINE: That's right. There is something that happened in Rochester County; I don't know what it is.

When you called me on this matter, I put a phone call in to Albany -- whose name escapes me -- and he volunteered to find out and report back to me, but he has not.

MR. IMBERMAN: I think I can say something in that regard,your Honor. I agree the drop here is not entirely due to the failure to pay the correct Medicaid rate. It's something much more serious than that, which is directly involved in this lawsuit, and that is the State has not been paying the money to the county, and the county doesn't have it, and the law requires that the State part of the Medicaid plan, it must see to it that the hospitals are reimbursed. It may appoint counties or cities to be the agents to pay out the money, but it's the State's responsibility.

THE COURT: Let me comment on that. Two things: First of all, I'm not in a position to comment on what responsibility the State has beyond what we have already discussed in detail up to this date and we have not discussed the question you are now raising, although you may be entirely correct, and if you need relief on that and it is within my jurisdiction, you are certainly free to apply for it.

The second thing is my stay, which I announced at the outset of today's discussion, proceeded on the assumption that, tight as money might be for the hospital, nobody would go out of a business as a result of the stay for the limited period of time which I expect this will be in effect.

If, however, I have proceeded on a mistaken assumption in that regard, the plaintiffs are free at any time to ask for modification of the stay, and particularly with regard to a particular hospital in a desperate situation --

MR. FINE: Your Honor, I repeat, this is obviously nothing to do with the rate.

THE COURT: I already said it must be --

MR. FINE: Something has gone wrong.

THE COURT: -- if there is a deliberate --

MR. FINE: If this were true --

THE COURT: -- if the monies had not been paid because of either affirmative or negative actions in Albany which results in the money not being available to the conduit agency, that is economically serious in terms of economic survival.

MR. IMBERMAN: I know it's not evident. All I know is the president says the State owes them $7 million for Medicaid payments and hasn't paid it.

Let me just go to one or two of the points that Mr. Fine has made, and he has made this point for the second time -- I think he made it on September 14 also -- that is, the Director of the Budget has the statutory power to consider the economic conditions in the State, and if he feels the rates are too high, he can in effect send them back to the Commissioner of Health and say "recompute these." That may be so far as the introstate officials are concerned. But Mr. Goldmark, the Director of the Budget, is a defendant in this case, and Mr. Goldmark is subject to your Honor's order, and, as I said two weeks ago, Mr. Goldmark cannot overrule your Honor's order because he says in his opinion the State does not have the money.

I think it boils down to something as simple as that.

THE COURT: I agree with you, and I find it hard to believe Mr. Fine intended to convey any other thought.

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MR. FINE: I'm just saying -- wait a second. Let us spell this a little bit out.

Until January 1, 1976, the rates fixed under the 1975 or any prior year's statute required the approval of the Director of the Budget. In 1976, the legislature gave the Director of the Budget an additional requirement as a precedent to his approval; that additional precedent to his approval is an existing statutory requirement, and I can see no reason why he could not legitimately say to his Honor, "I have followed your directive. We have recomputed the rates. They have been certified to me. But I'm withholding my approval because the State can't afford that."

THE COURT: He may be against the order --

MR. FINE: He can say this to you, with all due respect, and without in any way intending --

THE COURT: Of course he can say it. If you think it has any legal significance, you are free to argue whatever legal significance it has.

On the basis of the present discussion, it seems to me the Court's responsibility, if it found his disapproval resulted in noncompliance with federal requirements, would be to order him to comply with federal requirements.

MR. IMBERMAN: That order is in existence.

THE COURT: Well, it is. The order with regard to recomputing and everything stands. The payments are stayed pending your motion.

MR. IMBERMAN: Your Honor, I am not sure what your Honor's opinion says. I want to make the record clear. Your July 30 order directed the defendant, including Mr. Goldmark, to promptly recompute and pay --

THE COURT: I quoted in this --

MR. IMBERMAN: In connection with your Honor's order, does your Honor's decision make it clear how soon the State has to indicate whether it is going to abide by this condition or not, that is, pay the interest or not?

THE COURT: No, it does not. The stay wouldn't go into effect unless --

MR. IMBERMAN: Unless they affirmatively agree.

THE COURT: I haven't said that, but I'll say it now. Let me say this: I said at the end of this memorandum, "It is so ordered," because I wanted dispositive language. However, after each of you study this, if you wish to submit any supplemental order, or

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believe a supplemental order is appropriate or necessary to carry out the provisions of this determination, I would be glad to entertain such an order, and it is -- I do think there is no reason why the State shouldn't indicate by a very near date whether it will accept the conditions of the stay or not.

Frankly, it seems to me -- well, I won't say any more than that.

Can I ask the Attorney General's office how quickly you can let us know?

MR. FINE: Today is Tuesday.

THE COURT: That's right.

MR. FINE: I have to clear it with the people in Albany.

Would you give me until Friday?

THE COURT: Friday noon?

MR. FINE: Friday noon.

MR. IMBERMAN: That means you will inform the Court and me, I assume --

MR. FINE: Yes.

MR. IMBERMAN: -- whether the State accepts the conditions of Judge Lasker's determination?

MR. FINE: Yes.

May I make one comment? In view of the fact

Mr. Imberman complains about the Genesee Hospital, and in view of the fact I made a telephone call and did not get a reply and I want to make sure the falloff in payment in Genesee Hospital does not reflect any controversy about the rate-making procedure before your Honor but may be due to intrinsic purposes I have no knowledge of, I would like to inquire into this and inform your Honor and Mr. Imberman about this.

THE COURT: I would appreciate it.

MR. IMBERMAN: I would appreciate it.

THE COURT: If he finds it does not have to do with this or other litigation which he has mentioned, would you please make an application to a Supreme Court judge in Monroe County to force the State to pay the hospital? I would appreciate it greatly.

MR. IMBERMAN: All right, Judge.

THE COURT: I will give you copies of this after I have amended it. It's all right.

What now?

MR. IMBERMAN: Today is September 28.

THE COURT: When is your brief due?

MR. IMBERMAN: Our brief is due a week from tomorrow, which is October 6.

- - -

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., MISERICORDIA HOSPITAL MEDICAL CENTER and BUFFALO GENERAL HOSPITAL, THE GENESEE HOSPITAL and THE MOUNT SINAI HOSPITAL, on behalf of themselves and all other nonprofit hospitals which are members of the HOSPITAL ASSOCIATION OF NEW YORK STATE, INC. and which are reimbursed for Medicaid Services rendered to hospital patients,

Plaintiffs,

- against -

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, ROBERT P. WHALEN, as Commissioner of Health of the State of New York, PETER GOLDMARK, as Director of the Budget of the State of New York, HUGH L. CAREY, as Governor of the State of New York, and DAVID MATTHEWS, as Secretary of the U.S. Department of Health, Education & Welfare,

Defendants.

12/8/76

ANSWER TO SECOND AMENDED COMPLAINT

76 Civ. 2027

(Judge Lasker)

The defendants Toia, Whalen, Goldmark and Carey (hereafter referred to as the State defendants) answering the second amended complaint (hereafter referred to as the second complaint) herein by their attorney Louis J. Lefkowitz respectfully:

1. Admit the allegations of paragraph 1 of the second complaint but have no knowledge or information sufficient to form a belief as to the truth of the allegations therein except those descriptive of the nature of the action.

2. Admit the allegations of the first two sentences of paragraph 2 of the second complaint but deny the allegations of the balance of the paragraph.

3. Admit the allegations of the first sentence of paragraph 3 of the second amended complaint but deny the allega-

tions of the second sentence and assert that approval by the Department of Health, Education and Welfare (HEW) was not required.

4. Admit the allegation of the first sentence of paragraph 4 of the second complaint but deny the allegations of the second sentence thereof.

5. Deny knowledge or information sufficient to form a belief as to the truth of paragraphs 5, 7, 8, 9, 10 and 11 of the second complaint.

6. Deny the allegations of paragraphs 22, 40, 41, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, and 67 of the second complaint.

7, Admit the allegations of paragraphs 12, 13, 14, 15 and 16 but deny those portions of those paragraphs which allege the named officials acted or are acting contrary to the Constitution and laws of the United States.

8. Deny the allegations of paragraphs 17, 18 and 19 of the second complaint.

9. Admits the allegations of paragraphs 21, 24, 25, 26, 29, 33, 34, 35, 36, 37, 39, 40, 43, 44 and 45 except that the State defendants respectfully refer to the Statutes and Regulations therein referred to for a full and accurate statement of their text and the State defendants deny those portions of said paragraphs which allege the State statutes or regulations referred to were arbitrary or denied to the hospital the reasonable costs of furnishing services within the context of New York's prospective rate-setting methodology or that the Regulations referred to required HEW approval.

10. Admit the allegations of paragraph 27 of the second complaint but allege the State executed the consent referred to under protest.

11. Admit the allegations of paragraph 30 of the complaint but deny that said freeze violated any law, statute or regulation or required HEW approval.

12. Admit the allegations of paragraph 33 of the second complaint but deny that such changes have altered the State Plan that it no longer provides reasonable cost reimbursement within the context of New York's method of prospective rate setting.

13. Admit the allegations of paragraph 38 of the second complaint but deny that the hospitals have no adequate opportunity to contest the imposition of the penalty therein referred to.

14. Deny the allegations in paragraphs 3 and 44 that the Regulation 86.26 was not approved or submitted and assert that the Regulation was promulgated as an emergency measure pursuant to New York's Executive Law § 110a-(3).

15. Admit the allegations of paragraph 46 of the second complaint.

16. Admit the allegations of the first sentence of paragraph 47 of the second complaint but deny the allegations of the balance of the paragraph.

17. Admit the allegations of paragraph 48 of the second complaint and respectfully refer the Court to the Regulations and Section 365-c(2) of the New York State Social Services Law for the full text of the Regulations and Law.

18. Admit the allegations of paragraph 49 of the second complaint but deny that the plaintiffs will be reimbursed less than the reasonable cost of providing the services referred to therein within the context of New York's prospective reimbursement method.

19. Admit the allegations of paragraph 23 of the second complaint but deny those allegations of said paragraph which

allege that prior approval by HEW is required as respects changes in the State Plan.

20. Admit the allegations of paragraph 42 of the second complaint but deny that Regulation 10 NYC 86.26 would deny hospitals their reasonable costs. The Regulation was approved by HEW on or about October 4, 1976.

21. Admit the allegations of paragraph 32 of the second complaint except that they deny upon information and belief that the hospitals cost of providing services is greater in 1976 than in 1975 within the context of New York's prospective methodology.

AS AND FOR A FIRST SEPARATE
AND AFFIRMATIVE DEFENSE, THE
STATE DEFENDANTS ALLEGE:

22. Public Law No. 94-182, § 111, 42 U.S.C. § 1396a(g) referred to in paragraph 27 of the second complaint which require the States to consent to suit in Federal Court by providers of in-patient hospital services and to waive the immunity from such suit under Amendment XI to the Constitution of the United States is unconstitutional and beyond the power of the Congress to enact. The State of New York executed its consent under protest and by reason of the fact that failure to execute the consent would have cost the State upwards of $40,000,000 in Federal Funds. The State executed the consent but expressly reserved the question of the propriety of the demand for this waiver. See letter dated March 31, 1976 from defendant Toia to Commissioner Toby of the Department of Health, Education and Welfare attached hereto as Exhibit "A".

The State defendants assert that this Court has no jurisdiction under said Public Law 94-182, nor under any other of the statutes cited in paragraphs 17 and 18 of the Second Complaint.

Said Public Law No. 94-182, 42 U.S.C. § 1396a(g) § 111 is violative of the XI Amendment to the Constitution and of the equal protection of the laws provided for in the XIV Amendment to said Constitution.

AS A SECOND, SEPARATE AND AFFIRMATIVE DEFENSE, THE STATE DEFENDANTS ALLEGE:

23. This action against the State defendants is an action against them as officials of the State of New York. The State has not by constitutional provision or statutory enactment -- consent to suit in the Federal Courts nor to a waiver of its sovereign immunity from suit in Federal Court. This Court is without jurisdiction.

AS A THIRD, SEPARATE DEFENSE, THE STATE DEFENDANTS ALLEGE:

24. By Chapter 76 of the Laws of New York of 1976, the Medicaid rate of payments to hospitals for out-patient services was set at 100% of the level of payment made in 1975. Chapter 76, § 11(2)(c). Said Chapter 76 is constitutional and not violative of the Social Security Act of Federal Regulations issued thereunder. The prayer for injunctive relief set forth in the second complaint would necessarily restrain and enjoin the operation of this statute by the State defendants. Such restraint may only be ordered by a district court of three judges. 28 U.S.C. § 2231, 2284.

The State defendants respectfully request that a three-judge district court be convened to adjudicate the issue.

AS A FOURTH SEPARATE DEFENSE, THE STATE DEFENDANT ALLEGE:

25. All of the State Defendants have their offices and principal places of business in the City of Albany, Albany

County, New York within the Northern District of New York. The claims herein involved arose in that district. The proper venue of this action is in the Northern District of New York. 1391 U.S.C. (b).

WHEREFORE, the said State defendants ask judgment dismissing the Amended Complaint.

Dated: New York, New York
October 22, 1976

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for State Defendants
Office & P. O. Address
Two World Trade Center
New York, New York 10047
Tel. (212) 488-3391
By:
Jesse J. Fine
JESSE J. FINE
Assistant Attorney General

STATE OF NEW YORK
DEPARTMENT OF SOCIAL SERVICES
1450 WESTERN AVENUE
ALBANY, NEW YORK 12243

PHILIP L. TOIA
EXECUTIVE DEPUTY
COMMISSIONER

March 31, 1976

Dear Bill:

Enclosed is the State Plan amendment demanded by you under penalty of fiscal sanctions in your Action Transmittal, SRS-AT-76-14(MSA) dated January 28, 1976. This submission is designed to facially comply with the requirements of Section 111, P.L. 94-182, December 31, 1975.

Please be advised, however, that there are serious questions being raised by this and other states as to the constitutionality of the requirements imposed by this statute. Accordingly, this submission should not be interpreted as an acquiescence by us of the legal appropriateness of this demand. Indeed, we expect such questions to be resolved in an appropriate legal forum in the near future.

Sincerely,

Phil
Philip L. Toia

Honorable William Toby
Acting Regional Commissioner
Social & Rehabilitation Service
Region II
Department of HEW
Federal Building
26 Federal Plaza
New York, New York 10007

APR 1 12 01 PM '76

EXHIBIT A P. 1

☆ U.S. GOVERNMENT PRINTING OFFICE— 1974-603-213

TMENT OF HEALTH, EDUCATION, AND WELFARE
L AND REHABILITATION SERVICE
ton, D. C. 20201

Submit 6 Copies

MAY 3 1976

TRANSMITTAL AND NOTICE OF APPROVAL OF STATE PLAN MATERIAL
SOCIAL AND REHABILITATION SERVICE STATE PLAN PROGRAMS

EGIONAL COMMISSIONER
OCIAL AND REHABILITATION SERVICE
EPARTMENT OF HEALTH, EDUCATION, & WELFARE
EGION NY

TRANSMITTAL NUMBER 76-8

STATE New York

PROGRAM IDENTIFICATION XIX

F PLAN MATERIAL (CHECK ONE)
EW STATE PLAN
MENDMENT TO BE CONSIDERED AS NEW PLAN
MENDMENT

PROPOSED EFFECTIVE DATE January 1, 1976

LETE NEXT 4 BLOCKS IF THIS IS AN AMENDMENT *(Separate transmittal for each amendment)*

AL REGULATION CITATION
P.L. 94-182, Section 111

R OF THE PLAN SECTION OR ATTACHMENT
Revised page 24a-Title XIX Plan as required by SRS-AT-76-14

NUMBER OF THE SUPERSEDED PLAN SECTION OR ATTACHMENT
Page 24a

CT OF AMENDMENT
State Consent to Suit

NOR'S REVIEW (CHECK ONE)
GOVERNOR'S OFFICE REPORTED NO COMMENT
COMMENTS OF GOVERNOR'S OFFICE ENCLOSED
NO REPLY RECEIVED WITHIN 45 DAYS OF SUBMITTAL
☐ OTHER, AS SPECIFIED:

TURE OF STATE AGENCY OFFICIAL
for Stephen Berger
Commissioner
March 30, 1976

TO:
NYS Department of Social Services
1450 Western Avenue
Albany, New York 12243

EXHIBIT A

FOR REGIONAL OFFICE USE ONLY
DATE RECEIVED 1 APR 1976
DATE APPROVED MAY 1976
PLAN APPROVED -- ONE COPY ATTACHED
EFFECTIVE DATE OF APPROVED MATERIAL
William Toby
SIGNATURE OF REGIONAL OFFICIAL
TYPED NAME: William Toby
TITLE: Acting Regional Commissioner
REMARKS

[illegible]

Revision: SRS-AT-76-14(MSA) - 34a -
January 28, 1976

State NEW YORK

Citation
45 CFR
250.70
F.R. 40-36

4.27 Disclosure of Information on Providers of Health Care Services and Contractors.

The State agency has established procedures for disclosure of information on providers of services, contractors, carriers, intermediaries and State agencies. These procedures meet all requirements of 45 CFR 250.70.

P.L. 94-182
Sec. 111

4.28 State Consent to Suit

The State hereby consents to allow suit in Federal court by or on behalf of providers of inpatient hospital services with respect to payment of reasonable costs of such services, furnished for any period after June 30, 1975, pursuant to section 1902(a)(13)(D) of the Act. The State waives any immunity from such a suit under the eleventh amendment to the Constitution or otherwise.

EXHIBIT A
p. 3

[illegible]

Entered in Docket ✓ GG

Entered in Diary for

FILED OCT 29, 1976

Notification Oct 29 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., MISERICORDIA HOSPITAL MEDICAL CENTER, BUFFALO GENERAL HOSPITAL, THE GENESEE HOSPITAL, and THE MOUNT SINAI HOSPITAL on behalf of themselves and all other non-profit hospitals which are members of the HOSPITAL ASSOCIATION OF NEW YORK STATE, INC. and which are reimbursed for Medicaid Services rendered to hospital patients,

Plaintiffs,

- against -

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, ROBERT P. WHALEN, as Commissioner of Health of the State of New York, PETER GOLDMARK, as Director of the Budget of the State of New York, HUGH L. CAREY, as Governor of the State of New York, and DAVID MATTHEWS, as Secretary of the U. S. Department of Health, Education & Welfare,

Defendants.

JUDGMENT

76 Civ. 2027
(Judge Lasker)

The defendants Toia, Whalen, Goldmark and Carey (the State Defendants) having requested a stay of the judgment of this Court made July 30, 1976, entered August 2, 1976, until this Court's determination of the retroactive effect to January 1, 1976 of the approval of the Department of Health, Education & Welfare on August 16, 1976, of certain regulations relating to the reimbursement of the nonprofit hospitals which are members of the plaintiff class for services rendered under the Medicaid program;

And this matter having come on to be heard by this Court and all the parties having appeared by their respective counsel, and upon the opinion and order of this

Court dated September 28, 1976, it is further

ORDERED AND ADJUDGED, that the judgment of this Court dated July 30, 1976, entered August 2, 1976, requiring the State Defendants promptly to recompute and pay to the members of the plaintiff class reimbursement for Medicaid services calculated in accordance with the New York State Plan in effect prior to August 16, 1976, is stayed pending the determination by this Court of the retroactive effect of said approval by the Department of Health, Education & Welfare upon the express acceptance by the State Defendants by letter dated October 1, 1976 of the following condition - that as to any payments as to which the stay applies, such payments if hereafter required to be paid, shall be paid by the State Defendants to the members of the plaintiff class together with interest thereon at the legal rate in New York from September 28, 1976 to the date of payment.

Dated: New York, New York
October 15 1976

Lasker.

U. S. D. J.

Judgement Entered 10/29/76
Raymond F. Bu
Clerk

file in transcript book

~~SSM~~

~~SR~~

jqds

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

-----------------------------------x

HOSPITAL ASSOCIATION OF THE STATE OF NEW YORK, et al., :

Plaintiffs, :

-vs- : 76 Civ. 2027

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, et al., :

Defendants :

-----------------------------------x

Before:

HONORABLE MORRIS E. LASKER,
District Judge

New York, New York
November 4, 1976--2:00 p.m.

APPEARANCES:

PROSKAUER, ROSE, GOETZ & MENDELSOHN, ESQS.,
Attorneys for the Plaintiffs
BY: JACOB IMBERMAN, ESQ.,
STEVEN S. MILLER, ESQ.,
SUSAN ROSENFELD, ESQ., of Counsel

JOHN O'CONNOR, ESQ.
Assistant U.S. Attorney for Defendant Matthews

JOEL LEWITTES, ESQ.,
Assistant Attorney General of the
State of New York

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THE COURT: I suggested that we get together concerning Mr. O'Connor's letter of yesterday. I note that Mr. Imberman has asked the reporter to be present and I have no objection to that. I don't know that anything is going to take place that is going to be of significance except maybe questions that are raised by the letter.

I should tell you this: I am running into some calendar problems of my own in which the next result is that it would help me somewhat if this case could be postponed for a couple of weeks beyond the date that we have set for the present time. If that could be worked out for the parties as well, perhaps that would take care of Mr. O'Connor's problem and if it wouldn't I would have to hear why not.

We could commence on the 27th of December. We don't have a jury here and it's not a question of anybody going to jail at Christmastime.

MR. IMBERMAN: No problem.

THE COURT: Is that all right for you?

MR. LEWITTES: That is fine.

THE COURT: In the light of that, Mr. O'Connor, that would give you almost two months from now. I realize that you are surprised to be taken seriously as a defendant all of a sudden, but I guess if you are going to go ahead and approve what the state does -- and I haven't really

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studied the amended complaint since I assume that is the basis of it. Since you approve what the state does, you are just as responsible as they are.

Of course, you are entitled to a reasonable amount of time to get ready for that but there are two points I make.

One is the actual amount of time that is now available. The second is that I would suppose the defense on those points would be essentially the same as the defense of the state and while you may differ, I suppose, as to how you approach the problems of reasonable cost or one thing or another, still you should be able, I think, to assist each other on those points.

So since we are here because you felt that you might not have enough time to get ready, do you think now that with the case off for two months and in the light of what I have just said, that you will be able to handle it and, if not, I would like to know why because I really would like to get the case going. I think it's a matter of sufficient public import that it ranks even with the interests of the federal government in its importance.

MR. O'CONNOR: Let me Just ask a preliminary question. With regard to the starting on the 27th of December, is there another day that would be near to that that your

Honor could start? I was wondering if we could change it from that particular week to the next week. I planned to be away between that week and New Years.

THE COURT: I have a real problem. On the 3rd of January I am starting a very long, possibly 6-week criminal multi-defendant case. What about the week before the 27th? I would make an effort to see whether I could get the people who were going to go to trial on the 20th to go to trial on the 27th instead. That would give you one less week for preparation but I can't take care of all of your requirements.

MR. O'CONNOR: I was mainly interested in getting a clear picture of whether we are starting with a particular trail date and we are working from that and pushing everything back in light of that or whether the trial date could be changed somewhat depending upon the discovery. If we are going from the trial date as more or less a date certain and working back, I would try to fit in everything within that amount of time.

Just as an example, today is the 4th. If we served any interrogatories or some interrogatories that we wish to serve on the plaintiffs, say, by the 12th, which would give us one week, then the question arises as to how long the plaintiffs are going to have to respond. For example, if we serve them on the 12th would they be able to answer us

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by, say, December 3? That would be three weeks afterwards.

THE COURT: I suppose to some extent it depends on the nature of the interrogatories. But if they are the kind of material that in my guts I would expect them to be in this case, it would seem to me Mr. Imberman is fairly well primed to answer them. He has preapred a good deal of material for the original hearings and so on, which goes to the merits of the case. I had better let him speak for himself, however.

Why don't you tell us what the thrust of the interrogatories is going to be.

MR. O'CONNOR: Your Honor, one of the reasons that I wrote the letter and I needed the clarification and I felt I had to argue against a foreshortening of the time is that we are right now in the process of analyzing our position with regards to the various defenses that we would have available to us and that we wish to put forth. Though I met with them this morning with regard to this, we don't have an absolutely clear picture.

THE COURT: You mean with your clients?

MR. O'CONNOR: Yes.

THE COURT: I can understand that. But can you give us an idea of what the issues are on which interrogatories might be served? If you don't serve them, so much the

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better. At least you must have some idea of what they might be.

MR. O'CONNOR: I have an idea of what they might be. We would like to know some basis for the legal conclusions that the plaintiffs have, specifically what are they claiming. We would like to know what experts they intend to call at the trial and also what their testimony would be, the experts that is.

Another area delineating general areas, and I hope I am not limiting myself --

THE COURT: I am not trying to preclude you.

MR. O'CONNOR: We would be interested perhaps in serving interrogatories with regard to the plaintiffs' estimate of what they think their reasonable costs are and with regard to information on the specific hospitals as to the hospitals' estimates of their own costs.

THE COURT: Every one?

MR. O'CONNOR: No, not every one.

THE COURT: There I can see. The other things you mentioned, although Mr. Imberman has to be the judge of how long it would take to answer, it seems to me are capable of accomplishment within a relevantly limited period of time. If you are going to ask the hospitals to dig up a lot of figures, they won't have Mr. Imberman's assistance and they

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may or may not know how to do it quickly.

MR. O'CONNOR: That is exactly the situation I am in now. We know we want the former. We are analyzing our position as to whether or not we want to pick out individual hospitals and ask them how they figure their costs, what their methods are of controlling their costs, what variables go into their methods, what they have tried, if they have tried cost-cutting, and whether they have been successful or unsuccessful at cost-cutting.

I am just giving certain examples. I am not saying we are because we are analyzing, but if we do ask those types of questions it becomes a much more extensive discovery.

THE COURT: I am wondering with regard to those types of questions whether you aren't more likely to get meaningful responses by deposing responsible people within the hospital which could occur at the same time as preparation of answers on other matters.

B2

MR. IMBERMAN: I would just say this, your Honor: The state requires the hospitals to maintain and to file uniform financial reports and every hospital in the State of New York files these with the Department of Health. So it seems to me if Mr. O'Connor wants to know any detail about any hospital's cost for any year, it's freely available to him from his co-defendant.

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THE COURT: It's freely available from the plaintiffs too.

MR. IMBERMAN: That is basic.

THE COURT: It's not a question of whether he gets it from Mr. Lewittes or you. It's available.

MR. IMBERMAN: If he is insisting that he going to get it from me, he is going to get it, of course.

THE COURT: All right. There may be more than that too, although I am not trying to create complications. I can imagine that in connection with such undefined concepts as reasonable costs and so on that either party may want to get as precise as possible an interpretation of the material developed by the other and that may require, or certainly would be made more effective by getting the face-to-face testimony of a witness so that if you look at a document and you don't entirely understand it you can ask it or you can ask what this means or why they put this figure there instead of that figure and so on.

But if you were to do that, Mr. O'Connor -- and I don't know what number of hospitals you think you might want to inquire about, but if it was a reasonable number, and I think it would become oppresive after a while, it would seem to me that you can plan those depositions during the period that is alloted and that the plaintiffs could answer

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your interrogatories in the meantime because the interrogatories or the first group that you talked about, while significant, are of a different character of information than the second.

MR. O'CONNOR: Agreed.

THE COURT: So I would think that it would be possible if it foreshortened the period to foreshorten it, and it would be in the interest of justice for this case to go forward not later than the 20th or 27th of December and I think the federal government is, relatively speaking, a bystander, although you have a financial stake in this too, but certainly the state has a significant interest in getting this matter determined once and for all and since we are in this kind of limbo situation, I think it's very important that it be decided.

Is there anything else anybody wants to say? I don't know. If I were sure I could get in touch with the lawyers who case is being tried on the 20th at the present time I would do so, but they are out of town, at least one of them is, and I am not sure I can.

All I can do is to undertake to have somebody call them and see what possibilities there are and let you know this afternoon or tomorrow whether it will be the 20th or 27th.

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MR. IMBERMAN: I have just one minor matter to call to your Honor's attention. Interrogatories that we served basically called for an identification of documents and identification of persons who had something to do with making policy determinations in connection with those regulations and I asked Mr. Lewittes whether he would be good enough instead of just identifying the documents, to give me copies or make them available to me to save me a step in the discovery process. That is, I wouldn't have to serve a Rule 34 motion, and he said he would be willing to do that.

When I asked Mr. O'Connor whether he would do that, the best I could get from him as of five minutes before we came into your Honor's chambers was that he would let me know some time on or before November 15 whether he would give me the documents or just identify them in some way. That is really doing this the long way.

THE COURT: Let me find out what his reason is. It's obvious it would be helpful to you and he is not doing it to be obstructive.

MR. O'CONNOR: I will tell you quite frankly what the reason is, your Honor, and will abide by whatever the result is.

I found in my past dealings if I pick out a particular date, for example, if I say I am going to try to

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do something by tomorrow, what seems to me to be relatively informal date, then I get a series of phone calls on that particular date asking me what the answer was which is perfectly appropriate in light of the date.

I decided I would prefer to be judged by my actions rather than by my promises. So I have tried to keep my promises down and I go about my business and bring about the actions. If my actions fall short I would like to be brought up on it.

What I represented is without giving him a specific date, and I represent now I will go about giving him an answer as fast as I can, but I am trying to avoid promising a certain date and then getting into what I consider the unnecessary heat of, for example, I say I will try to get back to you tomorrow --

THE COURT: How much time do you need to be able to tell him whether you can give him the documents or just identify them?

MR. O'CONNOR: Today being Thursday --

THE COURT: What does it depend on?

MR. O'CONNOR: It depends on my talking to the people in HEW and saying, "It looks like there is no problem, is there any problem with this or isn't there." If they say there is no problem I can go forward.

On the other hand, if there is a problem that I am not astute enough to recognize right now, I haven't promised something that I can't deliver.

THE COURT: I am sorry, but we all have to face deadlines. Let's give you a reasonable time to be able to advise us whether there is any problem. What you are really saying, as far as you are concerned, is that it's all right, you just want to be sure whether your client has an objections to it.

MR. O'CONNOR: Yes, I want to take the analysis a little further and I don't want to promise too early.

MR. IMBERMAN: If you identify a document I have a perfect right to ask you to produce it.

MR. O'CONNOR: I am not arguing with you at all.

MR. IMBERMAN: In order to save time, give me the document rather than listing it on a sheet of paper.

THE COURT: If it's a matter of expense, you can ask the plaintiff to pay for it. Isn't there somebody at HEW you can call this afternoon if you want to clear your conscience or tomorrow to check as to whether there is any reason why you shouldn't supply documents?

MR. O'CONNOR: Suppose I pick out a date, what about Monday? The problem is that I don't have a secretary. If I call up somebody and there is a busy signal I have to

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hang up the phone and I can't stand around the whole day trying to dial somebody at HEW. It sounds a lot easier than it is, which is the practical answer.

THE COURT: Your problems may be somewhat greater than the rest of us, but we all have some of these problems. Let Mr. Imberman know by Monday if you can't let him have the documents and if you can furnish them as quickly as possible.

MR. IMBERMAN: Mr. Lewittes, will I get your documents this week?

B3

MR. LEWITTES: You will get my documents from the Department of Social Services tomorrow. I expect, as far as the Department of Health is concerned, that you will get it some time early next week. I have a feeling, as you look through them, that you will realize that most of the documents required and the identification will have to do with those asked for from the Department of Social Services. There will be an overlap.

In any event, as I said before, I hope by the early part of next week the Department of Health will satisfy you.

MR. IMBERMAN: What about a list of individuals?

MR. LEWITTES: Yes.

THE COURT: If there are any problems which any of you have, that is defense counsel, with your clients about sluggishness or negativism, please let me know, if necessary, and please let them know that I have expressed a view that this is a case of considerable public importance that must be decided fairly and that the Court will use its influence to see that that is done.

In that regard I should tell you that I have decided the question of retroactivity. My secretary has not had a chance to type my decision. I have decided against the state. I don't think there is any merit in the argument. I think our dear friend made a very good try on a difficult proposition and maybe the state will prove me wrong, but I have done that.

I don't know whether this needs to be on the record or whether it can be but I thought I should tell you that in case it might affect the posture of the case in any way. Frankly, I don't see why it should. Even if you appeal and go back to the Court of Appeals on the question of the original preliminary injunction, which is now only partial, of course because of the approval the trial could still go forward.

So I see no reason to arrange anything any differently from what we have just been discussing, but at least you know about it. And the memorandum will be out tomorrow or Monday.

MR.O'CONNOR: May I just say one thing. With regard to the agencies, I have written down your statements or a note of them but I would like to say that the problem that I run into is not sluggishness.

For example, somebody who is working on the interrogatories that plaintiffs have served were on vacation for a week with regard to the original date. The HEW people have to conduct their standard business that they do every day, their non-litigation business, and they are not always available. That is where the problems come in.

THE COURT: I know there are always problems, but what I meant is to indicate to them that this case is regarded as more important than some others.

MR.IMBERMAN: I assume you intend to do the same thing. As far as we can analyze the documents we get and the list of witnesses, I intend to talk to you about noticing depositions and I would like to do this in as informal a way as possible. I hope I can call you up and say it.

THE COURT: You might be well advised to put aside a certain amount of time for yourselves even though you don't know how to use it.

MR. IMBERMAN: I would be willing to be as flexible as possible. I would like to take the depositions and run them from day to day and move them ahead as fast as we can. I hope that nobody is going to stand on the fact that the rules say you have to have so much notice in advance, etc., etc.

MR. O'CONNOR: I think that is directed at me. I am not going to stand on that fact. Say the rules say 10 days. It's a difference between whether you are talking about 10 days or you say you want one day. There is a lot of space in between there.

THE COURT: Let's not meet problems before they arise, or maybe we should meet them before they arise, but let's not create problems that may not arise.

What I would suggest, in view of the fact that you are all busy lawyers with bonafide obstacles to the completion of a job of this kind would be two things: First of all, that we recognize that this case has priority over -- and I won't say any case in the world, but at least all but one case on my calendar to the extent I am free, by which I mean I have the Speedy Trial Act staring me in the face that I can't ignore.

Second, with regard to something like the question of depositions, I would think that you might want right now to put down two or three days in such and such a week to be devoted to depositions in this case in case the depositions

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are necessary. If they are not, then that is that. You don't have to know who you are going to depose that day.

MR. IMBERMAN: That is a great idea.

Judge, Mr. O'Connor won't get his documents before November 15 but if I have Mr. Lewittes' I can start analyzing his documents and start deposing his people. We can move ahead that way.

THE COURT: Are you going to be present at every deposition?

MR. O'CONNOR: Right now I do want to be present.

THE COURT: All right.

* * * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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U.S. Dist. Ct.
Filed Nov 9 1976
11:46 A.M.
S.D. of N.Y.

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., MISERICORDIA HOSPITAL MEDICAL CENTER, BUFFALO GENERAL HOSPITAL, THE GENESEE HOSPITAL, and THE MOUNT SINAI HOSPITAL on behalf of themselves and all other nonprofit hospitals which are members of the HOSPITAL ASSOCIATION OF NEW YORK STATE, INC. and which are reimbursed for Medicaid services rendered to hospital patients,

Plaintiffs,

76 Civ. 2027

-against-

MEMORANDUM

#45348

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, ROBERT P. WHALEN, as Commissioner of Health of the State of New York, PETER GOLDMARK, as Director of the Budget of the State of New York, HUGH L. CAREY, as Governor of the State of New York, and DAVID MATHEWS, as Secretary of the U.S. Department of Health, Education & Welfare,

Defendants.
-------------------------------------x

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LASKER, D.J.

On appeal from the grant of a preliminary injunction prohibiting defendants from implementing without prior HEW approval three new State regulations, 10 N.Y.C. R.R. §§86.21(k), 86.14(b), and 86.26, which govern aspects of State reimbursement to hospital participants in the Medicaid program, the Court of Appeals remanded for a determination of whether or not HEW's approval of two of the regulations subsequent to the grant of injunctive relief rendered them retroactively effective.[1] The reasons which supported the earlier ruling that prior approval from HEW was required similarly compel a finding that approval of the regulations is prospective, not retroactive, in effect.

The State's principal contentions in support of the proposition that the regulation may be retroactively applied are substantially repetitious of its arguments on the question, earlier decided by the court, as to whether prior approval from HEW was required. We continue to believe that the initial ruling was correct and should not be modified or reversed. Both the language of the statute, 42 U.S.C. §1396a(a)(13)(D) and of the regulations promulgated by the agency charged with administration of the medicaid program, 45 C.F.R. §250.30 (a)(2) (see Lewis v. Martin, 397 U.S. 552, 559 (1970)) require that these kinds of charges -- that is, those going to the "methods and standards" for reimbursements of hospitals for inpatient services -- be approved by the Secretary prior to going into effect. See New Jersey Hospital Association v. Klein, Civ. No. 76-64 (D.N.J. April 9, 1976). Cf. Columbia Heights Mission House Hospital Inc. v. Weinberger, 380 F.Supp. 1066 (M.D.La. 1974).

It is suggested that because New York provides prospective rather than retrospective reimbursement of medicaid costs, prior HEW approval was unnecessary and retroactive application of HEW approval is appropriate: "Even if charges were unreasonable or confiscatory, prior approval of charges is not needed since the Plan *a priori* provides for a method of payment of costs." State Memorandum at 3. However, a hospital's ability to plan its procedures around reimbursement eligibility criteria (necessary to permit planning of the hospital budget) depends not on whether reimbursement is prospective or restrospective but on its knowledge before expenditures or other commitments are made of what the requirements for receiving State reimbursement are.

The State's argument that the hospitals were put on notice of the proposed changes is simply incorrect. Although it is true that the State advised the hospitals in the Fall of 1975 that its 1976 payments would be made on the basis of "interim" development of new rates, there was no notice that the State might attempt later in 1976 retroactively to change the rules under which the hospitals were operating in January, 1976. Indeed, when the State submitted the new regulations to HEW in the Spring of 1976, the State itself proposed an effective date of May 28, 1976 for regulations §§86.14(b) and 86.21(k) and of June 24, 1976 for regulation §86.26. Under these circumstances it is inconceivable that the hospitals can be charged with knowledge that the new regulations would be applied retroactively to January 1st. See St. Francis Memorial Hospital v. Weinberger, 413 F.Supp. 323 (N.D. Cal. 1976).

The State contends that retroactive effect must be given to the now-approved regulations because of 42 U.S.C. §1396a(a)(30) which requires a state plan to "provide ... methods and procedures relating to ... the payment for care and services available under the plan ... to assure that payments ... are not in excess of reasonable charges consistent with efficiency, economy and quality of care." It is argued that since the changes were approved, payments at the former rates -- to the extent that they were any higher -- would be "in excess of reasonable charges." However, the previous payment methods had also been approved by HEW and were presumably reasonable until such time as they were replaced. Moreover, as indicated above, it would be inconsistent at least with "efficiency," and "quality of care" to change the rules for reimbursable expenses after an expenditure period has ended.

We conclude that the regulations which were the subject of the preliminary injunction entered on August 2, 1976 may not be retroactively applied by the State to the period commencing January 1, 1976 but may be applied only from the date on which they were approved by HEW.

Accordingly, the defendants are directed to comply with the order of August 2, 1976 as modified by the order of October 15th.

It is so ordered.

Dated: New York, New York
November 5, 1976.

MORRIS E. LASKER
U.S.D.J.

1/19/76

FOOTNOTE

The State submitted two of the three proposed changes in a single "transmittal" to HEW. These two proposed regulations, 10 N.Y.C.R.R. §§86.21(k) and 86.14(b) were both approved by HEW on August 16, 1976. A third amendment (§82.26) was separately submitted by the State to HEW, and was approved by HEW on October 4, 1976. Although at the time of the Court of Appeals remand only two of the three regulations which were the subject of the preliminary injunction had been approved, now that all three of them have been approved we consider the retroactivity of all of them since all relate to the method of reimbursement for inpatient services and are governed by 42 U.S.C. §1396a(a)(13)(D) which requires prior approval by HEW.

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk.
By Deputy Clerk

U.S. DISTRICT COURT
FILED
NOV 15 1976
S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-------------------------------------X

HOSPITAL ASSOCIATION OF NEW YORK
STATE, INC., et al.,

Plaintiffs,

-against-

PHILIP L. TOIA, as Commissioner
of Social Services of the State of
New York, et al.,

Defendants.
-------------------------------------X

76 Civ. 2027
#45348

CORRECTING
MEMORANDUM

LASKER, D.J.

In the Opinion in this case filed November 9, 1976, the first line on Page 1 is amended to read as follows: "On appeal from the grant of an injunc-".

In addition, the last line of Page 1 is amended to read as follows: "require that these kinds of changes -- that is, those".

In addition, the fourth line of Page 4 is amended to read as follows: "subject of the judgment entered on August".

Dated: New York, New York
November 11, 1976.

MORRIS E. LASKER
U.S.D.J.

A TRUE COPY
RAYMOND F. BURCHARDT, Clerk
By
Deputy Clerk

7/19/76

ENDORSEMENT

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., et al., Plaintiffs, v. PHILIP L. TOIA, et al., Defendants. 76 Civ. 2027

LASKER, D.J.

The application for a protective order staying discovery, etc., is denied.

The application is predicated on the assumption that a motion for summary judgment which the State defendants, (and perhaps the federal defendants) intend to file forthwith, will eliminate the need for further discovery. While it is true that the change of focus of the case from the propriety of the actions of the State defendants to (at least in the first instance) the federal defendants' compliance with the requirements of the Administrative Procedure Act may possibly narrow the issues substantially, it is by no means clear at this moment that residual factual questions will not remain to be determined at trial. Considering the importance of the question to all the parties and the public, and the unfortunate aura of delay by the State defendants which has colored the case (including the failure to abide by the court's order to make payments to the plaintiffs) it would be inappropriate to stay plaintiffs' discovery.

There remains for determination the informal application of the State for postponement of the date of the commencement of trial. The appropriateness of such a postponement cannot be determined at this time. The decision will depend on the extent of discovery which is required and other relevant matters of trial preparation, including the special problems of change of attorney defending the case for the State defendants.

The motion for a stay of plaintiffs' discovery is denied. The informal application of the State for delay of the commencement of trial is denied without prejudice to renewal on a clear showing of the necessity for such an extension. Any decision relating to the time of trial will be influenced by the good faith or lack of good faith of the parties in proceeding to prepare for trial.

It is so ordered.

Dated: New York, New York
November 16, 1976.

MORRIS E. LASKER
U.S.D.J.

Filed
USDC of SDNY
11-17-76
Microfilm 11-17-76

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---x

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., MISERICORDIA HOSPITAL MEDICAL CENTER and BUFFALO GENERAL HOSPITAL, THE GENESEE HOSPITAL and THE MOUNT SINAI HOSPITAL, on behalf of themselves and all other nonprofit hospitals which are members of the Hospital Association OF NEW YORK STATE, INC. and which are reimbursed for Medicaid Services rendered to hospital patients,

Plaintiffs,

- against -

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, ROBERT P. WHALEN, as Commissioner of Health of the State of New York, PETER GOLDMARK, as Director of the Budget of the State of New York, HUGH L. CAREY, as Governor of the State of New York, and DAVID MATTHEWS, as Secretary of the U.S. Department of Health, Education & Welfare,

Defendants.

---x

NOTICE OF APPEAL

76 Civ. 2027
(MEL)

S I R S:

PLEASE TAKE NOTICE that the state defendants hereby appeal to the United States Court of Appeals for the Second Circuit from the order of the United States District Court, Southern District of New York (Lasker, D.J.) dated November 5, 1976 entered on November 9, 1976 in the office of the Clerk, United States District Court for the Southern District of New York denying retroactive application by the State of three new state regulations, 10 NYCRR §§ 86.21(k), 86.14(h) and 86.26 from the dates of their approval by the U.S. Department of Health, Education and Welfare to the period commencing January 1, 1976.

Dated: New York, New York
November 19, 1976

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HOSPITAL ASSOCIATION OF NEW YORK
STATE, INC., MISERICORDIA
HOSPITAL MEDICAL CENTER, et al.,

Plaintiffs

vs.

PHILIP L. TOIA, et al.,

Defendants.

Before:
HON. MORRIS E. LASKER,
District Judge

76 CIV. 2027

New York, November 15,17, 1976

STENOGRAPHER'S MINUTES

THE COURT: I think the change of venue is a brilliant suggestion.

MR. LEWITTES: I thought you might, your Honor.

MR. IMBERMAN: It is very cold in the Northern District in the wintertime, Judge.

MR. LEWITTES: Without any explanation why the idea was not prosecuted by Mr. Fine, I simply noted he did file an answer and put in the affirmative defense of change of venue which in my view is not proper, necessarily, as an affirmative defense, but since change of venue may be brought at any time within reasonable time, we think it is proper now particularly in the light of, number one, possible stay of the trial itself and, number two, the proposed intervention at this point by New York City Health and Hospitals Corporation.

THE COURT: It is not quite accurate to say intervention, but appearance for the first time.

MR. LEWITTES: We do, by the way, have with us today notices of motion for change of venue with a memorandum of law.

One question has arisen and it came to my attention just a few minutes before I left the conference today:

Mr. O'Connor, of the United States Attorney General's office, informed me the statute dealing with waiver by the state, waiver of immunity, that statute which is public law 94-Section 111-A, which Congress required any state which received federal funds under the Medicaid Plans to waive its immunity to suit under the Eleventh Amendment to the Constitution, has, according to Mr. O'Connor, been repealed effective January 1, 1976, is that correct?

MR. O'CONNOR: Yes.

THE COURT: January 1, 1976?

MR. O'CONNOR: This was all prefaced by the fact that it is my understanding. I have not investigated this completely. I was passing notification on to Mr. Lewittes.

MR. LEWITTES: Assuming that to be true only, there is --

THE COURT: You mean only assuming?

MR. LEWITTES: Assuming arguendo only, there is a question arising again as to federal jurisdiction.

We had raised that issue in our motion to dismiss, it was held against us --

THE COURT: Decided against you.

MR. LEWITTES: Yes, but we feel it may be an rmjw

issue now because there may be lack of jurisdiction because of that repeal.

THE COURT: May I ask what the source of your information to date is, Mr. O'Connor?

It comes as a surprise that this should not have been known at the time this issue was crystallized.

MR. O'CONNOR: I have a page from the statutes by itself, submitted to me, and from my reading of that xerox page and the information passed to me by the regional attorney of the HEW my understanding was that the statute demanding a state to consent to suit, as far as the Medicaid Plan, had been repealed by Congress and, in addition to that, the effective date of the repeal is January 1, 1976.

THE COURT: Which would mean the repealing statute was passed before January 1, 1976?

MR. IMBERMAN: No, your HOnor, it didn't happ that way.

The President, according to the press reports-- I was not there -- signed the bill a couple of weeks ago but it is nowhere near as simple as counsel here state and it certainly doesn't go to jurisdiction.

THE COURT: At least we all know there is such a factor and you can comment on that when the time comes.

MR. LEWITTES: Trying to get back on the track, if I may, we do have with us today notices of motion for change of venue pursuant to Title 28 1406-A or, in the alternative, Title 28, 1404, Subdivision A, to change venue to the Northern District of New York.

I don't think there is any need to argue the substantive issues of that motion right now, or perhaps it is not in order as well.

However, the fact is we sincerely believe that part of the problem, and perhaps the core of the problem with discovery and pretrial discovery may be grounded upon the fact that there is improper venue, that proper venue should have been, could have been placed in Albany, in the Northern District, and that has caused the serious problem we face now with discovery because all the offices of the state, defendants are in Albany, all the state defendants reside in Albany, all the records reside in the offices of these departments in Albany and doubtless all the witnesses reside in the Northern District, in Albany County.

THE COURT: I agree with you that it is inappropriate, except for a threshold showing, to discuss the merits of the venue question, but I wonder whether

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J.T.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HOSPITAL ASSOCIATION OF NEW YORK STATE INC., MISERICORDIA HOSPITAL MEDICAL CENTER, BUFFALO GENERAL HOSPITAL, THE GENESEE HOSPITAL, and THE MOUNT SINAI HOSPITAL, on behalf of themselves and all other nonprofit hospitals which are members of the HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., and which are reimbursed for Medicaid services rendered to hospital patients,

Plaintiffs,

-against-

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, ROBERT P. WHALEN, as Commissioner of Health of the State of New York, PETER GOLDMARK, as Director of the Budget of the State of New York, HUGH L. CAREY, as Governor of the State of New York, and DAVID MATTHEWS, as Secretary of the U.S. Department of Health, Education and Welfare,

Defendants.

76 Civ. 2027
JUDGE LASKER

MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of JOEL LEWITTES, Assistant Attorney General of the State of New York, sworn to the 7th day of December, 1976, and all prior proceedings heretofore had herein, the undersigned, on behalf of defendants Philip L. Toia, as Commissioner of Social Services of the State of New York, Robert P. Whalen, as Commissioner of Health of the State of New York, Peter Goldmark, as Director of the Budget of the State of New York and Hugh L. Carey, as Governor of the State of New York, will move this Court at a motion part thereof to be held at Room 1903, United States Courthouse, Foley Square, New York, New York, on the 17th day of December, 1976, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order of this Court to dismiss the complaint herein insofar as plaintiffs seek retroactive relief, and prospective relief not based on the Federal Constitution, on the grounds that all such relief is barred by the Eleventh Amendment and therefore beyond the subject matter jurisdiction of this Court and for such other and further relief as this Court may deem just and proper.

Dated: New York, New York
December 7, 1976

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for State Defendants
By:

JOEL LEWITTES
Assistant Attorney General
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-3391

TO:

JACOB IMBERMAN, ESQ.
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New York, New York 10007

Att: John M. O'Connor, Esq.
Assistant United States Attorney for the
Southern District of New York

SSM ✓

SR

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., MISERICORDIA HOSPITAL MEDICAL CENTER and BUFFALO GENERAL HOSPITAL, THE GENESEE HOSPITAL and THE MOUNT SINAI HOSPITAL, on behalf of themselves and all other nonprofit hospitals which are members of the HOSPITAL ASSOCIATION OF NEW YORK STATE, INC. and which are reimbursed for Medicaid Services rendered to hospital patients, : 76 Civ. 2027

Plaintiffs-Appellees,

-against-

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, ROBERT P. WHALEN, as Commissioner of Health of the State of New York, PETER GOLDMARK, as Director of the Budget of the State of New York, HUGH L. CAREY, as Governor of the State of New York,

Defendants-Appellants,

-and-

DAVID MATTHEWS, as Secretary of the U.S. Department of Health, Education and Welfare,

Defendant.

- x

December 17, 1976,
4 P.M.

Before:

Hon. Morris E. Lasker,
District Judge.

the Attorney General of the State of New York has to go to Washington to find counsel, counsel to cross swords with Mr. Imberman apparently.

MR. MILLER: Mr. Imberman's reputation precedes him. It will be, indeed, a challenge.

We have represented the state from time to time before in welfare related matters as well as other states. I think we were called upon in this case to assist in this case because it's one of many that seem to raise very basic issues of federal law and relates to the state's efforts to deal with this Medicaid and other program costs.

THE COURT: I have had inquiry from Judge Finesilver in Colorado about a case which is similar to this.

Do you know anything about that case?

MR. MILLER: I do not, your Honor. I would like to say, just to speak a minute, your Honor, if I may about our role in this case.

We have been involved with the Attorney General's office and the other departments for a short while. We are trying as best as we can to become as acquainted as we can as quickly as we can with what has turned out to be a very complex and very far reaching case.

THE COURT: I agree.

MR. MILLER: We are not on top of everything yet.

Our initial efforts in this case have been directed at the jurisdictional issue which is set forth in a motion which was filed with your Honor some days ago, which we did assist in the preparation of.

THE COURT: That is with regard to the new statute?

MR. MILLER: Yes. We had had some familiarity with that statute in connection with the advice and counseling of two states interested in the subject. We were aware of it when it was enacted, and after we were called upon to consult in this case, it seemed to us to have some immediate and direct application to this case.

THE COURT: When is that returnable?

MR. LEWITTES: Today.

MR. IMBERMAN: The motion is returnable today, your Honor.

If you want to discuss it, I have a view that I would like to express --

THE COURT: I will get to it. I didn't mean to discuss it, if you mean on the merits.

MR. MILLER: I don't mean on the merits.

THE COURT: How long in advance of the trial will that issue be crystalized? Obviously it should be crystalized as soon as possible.

MR. MILLER: I didn't mean to try to argue that on the merits, your Honor, just to indicate most of our efforts to date have been addressed to that question, although we are at this time and during this week have been trying to get on top of all the other aspects of this case as quickly as we can.

I hope that the motion can be brought on for hearing fairly quickly because it does appear to be dispositive of a number of the issues in the case and including, indeed, the issue that is before your Honor this afternoon, the whole issue of retroactive payments to the plaintiffs. That seems to have been the purpose for which the statute was adopted, to get at precisely this type of case.

Our motion is before you and we have set out the statute and the background of it. We have not yet received the answer to it, which was not due until today, although some comment was made about the issue in papers filed before the Court of Appeals on the state issue. So we have some notion of what the position on the other side is.

Since we do continue to feel that this is a matter that would be dispositive of the present matter of retroactive payment s, it's something that your Honor may wish to consider bringing forward for a decision as quickly as possible.

THE COURT: I must say I am a little confused because I have been told by Mr. Lewittes, it seems to me, that the state intended to make such payments, and what you have now said makes me wonder whether the state does intend to make such payments or does not.

MR. LEWITTES: I think the answer is we intend to, your Honor. We feel that this issue before the court on the motion to dismiss is so important and so urgent at this time that we would like to have a very early hearing.

THE COURT: Yes. Let's get it all out in the open. Both the things that are in my head at the moment are inconsistent with each other.

One is the proposition that the state is definitely going to pay, it's just a question of what the mechanics of it are going to be. At least that's what I had thought.

The other is the statement that the motion to dismiss has a decisive effect with regard to whether or not you are liable for those payments, if I understand you correctly.

MR. MILLER: That's correct.

THE COURT: Will I please decide that motion as quickly as possible because of the decisive effect. I don't see why if you are going to pay it makes any difference whether I decide it today, tomorrow or the next day.

MR. MILLER: Can I speak to that, your Honor?

THE COURT: Yes.

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MR. MILLER: The state is presently under obligation to take all the steps appropriate to payment of these retroactive payments.

I think as we go on later this afternoon to discuss the process by which this takes place, you will see, your Honor, that that does not involve an immediate payment, it involves the concluding, remaining steps that the state defendants to put the process in operation, after which there then becomes a further process involving local districts that make the payments.

THE COURT: Are you saying the state is going to go ahead with invoking the mechanics necessary to make the payment,but that you believe that it will take so many days or a week or ten days, or whatever it is, that the court might be able to decide this motion during that period of time and, of course, if it were decided in your favor, then the actual payment wouldn't be made, if it was decided against you, the payment would be made?

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MR. MILLER: That is the gist of it.

MR. IMBERMAN: May I be heard?

THE COURT: Of course. I want to know what their position is on the matter.

MR. MILLER: The state will comply with the order as long as it's extant. That compliance involves a process more lengthy I am afraid than ten days or a week before our final payment is made. We think this supervening jurisdictiona bar in the ordinary matter would be decided rather quickly.

Once it is decided, and if it is decided in favor of the state, as we think it should be, that would terminate the obligation to complete the payment process. That is all I am saying.

THE COURT: All right. Subject to another appeal, of course.

MR. MILLER: Of course.

THE COURT: Mr. Imberman.

MR. IMBERMAN: It seems to me, your Honor, what I am hearing here today is not only totally contrary to the representations which were made on the telephone to me by Mr. Lewittes, as a result of which I communicated with your Honor and I agreed that we would adjourn the motion to punish for contempt today so we could have this hearing so that Mr. Lewittes and somebody from the budget office could tell us exactly how the money was going to be paid promptly, but I am also hearing a rehash of what was presented to the Court of Appeals in connection with the application of the stay about the 11th Amendment problem and how that ought to be decided first and which the Court of Appeals rejected completely.

THE COURT: I can't comment on that.

MR. IMBERMAN: The argument was made and the Court of Appeals denied the motion for a stay.

We brought on a motion to punish for contempt, which your Honor signed the day that the Court of Appeals denied the motion for the stay. The motion to punish for contempt was brought on because there had been a flat refusal of the state to pay the money that was due and the Court of Appeals refused to stay that.

It was only after your order to show cause was signed that Mr. Lewittes called me. He told me that he had sent this letter dated December 13th to your Honor, which clearly says that the state is going to pay the money, and because we could not have a conference with your Honor yesterday, it was agreed to have a conference t oday, and the only two things that were to be decided was whether the state had the right to deduct a certain amount of money for the interns' and residents' salaries and how the interest would be paid.

Aside from that, I was flatly told the money is going to be paid.

THE COURT: So was I.

MR. IMBERMAN: As far as the motion to dismiss is concerned, I have a very simple suggestion with respect to that.

That motion, that issue is now before the Court of Appeals. The appeal which has been taken from the retroactivity issue and the preimplementation issue, the right for these regulations to go into effect before they were approved by HEW, Mr. Lewittes stated that that issue is before the court.

THE COURT: The effect of the new statute?

MR. IMBERMAN: Yes, absolutely, the 11th Amendment issue.

As a matter of fact, in one of his papers he said he was considering asking the Court of Appeals to remand the case to your Honor. I don't see how that can be done. I suppose he can make his motion.

The point is, your Honor, the issue of the effectiveness of the 11th Amendment and the repeal of the waiver is now before the Court of Appeals that will be heard according to the present schedule during the week of January 24th.

Mr. Lewittes' brief is due within ten days, and it seems to me that your Honor might just as well wait on that issue until the Court of Appeals decides it. In the meantime we can try the case on the merits.

If the hospitals have to repay the money, the State of New York can always recoup it because the hospitals are

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constantly receiving money from the state. There are constant adjustments.

THE COURT: That argument about who pays who, in this group it is a double edged argument. Each of you always said: Look, there's no harm. They can always get it from me. That's probably true on both sides.

I want to begin a direction of the meeting now. I agree with you, Mr. Imberman, that the purpose of this meeting was to discuss the items specified in Mr. Lewittes' letter. I am perfectly willing, of course, to hear what new people coming into the case want to tell me they think is important. I will be conscientious about reviewing the papers on the motion to dismiss.

If the record on the motion to dismiss before me is not complete in describing the extent to which the issue has been put before the Court of Appeals, I invite either of you or both of you to supplement it by letting me know what is before the Court of Appeals and how it's been placed before the Court of Appeals.

I won't say that I will automatically defer on the matter just because it is before the Court of Appeals, nor will I say that I will not. I want to study it and think about what I think is the right thing to do.

We will put the motion to dismiss on the side for

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the rest of this afternoon and proceed with the agenda as laid out originally.

Can we go to the items specified in your letter, Mr. Lewittes?

MR. MILLER: If your Honor please, may I speak to this?

THE COURT: Anybody can speak to it. I want to stick to those subjects.

MR. MILLER: We asked Mr. Elston from the Budget Bureau to be here this afternoon in order to discuss the questions of implementation that have arisen.

I will let you talk to him, let him speak because he can describe the situation best, what the state has done in the interim, even while the application for stay was before the Court of Appeals and during which time I understand it was understood between counsel that no effort would be made to enforce the court's order.

During that period, your Honor, the state defendants, basically the Health Department, has undertaken the necessary task of computing the rates involved for the period involved in order to begin the process of paying the retroactive claims. One or two questions arose in that connection with that recomputation. Most of them have been resolved.

As a matter of fact, I think it will be unnecessary in which Mr. Lewittes says in the recalculation of these rates, the Department of Health has included a partial salary disallowance for interns and residents despite the fact that HEW approval of that feature of the rate was not obtained until October 4, 1976.

MR. MILLER:Could I interrupt?

That turns out to have been an error.

MR. IMBERMAN: That was wrong?

MR. MILLER: Deduction was not included.

MR. IMBERMAN: You are withdrawing that part from the letter?

MR. MILLER: Yes. The rates have been recalculated and do not include that 10 percent reduction.

THE COURT: Mr. Imberman, is your answer on the motion to dismiss being filed today or what?

MR. IMBERMAN: No, sir. If your Honor please, I would like to suggest that the motion to dismiss be adjourned for two weeks to give us an opportunity to put something before your Honor with regard to the propriety of waiting for the Court of Appeals to decide this.

In the interim, Mr. Lewittes' brief is due I think on the 24th of December and it seems to me --

THE COURT: Brief on what?

MR. IMBERMAN: On the appeal to the Court of

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Appeals. If his brief squarely raises the 11th Amendment issue as well as the issue of the effect of the statute which repealed the waiver, then it seems to me the issue is going to be clearly before the Court of Appeals, as I thought Mr. Lewittes indicated when we were there earlier this week, and then it would seem to be proper for your Honor to wait.

THE COURT: Let me say this. You will have an opportunity, of course, to make a statement.

I feel an obligation to the public to decide any question which would have a fundamental effect on the outcome of this litigation as promptly as is appropriate in the circumstances. That is a rather vague statement. Let me be more specific.

If the matter were possibly to be before the Court of Appeals I would certainly ask you to get your brief in right away and I would decide it as quickly as I could. I think you are entitled to put before me the question of the effect of the possible presentation of the matter to the Court of Appeals.

I don't think that even the existence of that fact would necessarily preclude the District Court from jurisdiction. The question would be whether it made any sense to do so. The question I am talking about, by the way, of course is not the 11th Amendment, per se, but the statute. The 11th Amendment I have decided rightly or wrongly, and that is before the Court of Appeals now. This leads me to ask the state what they are going to put before b9 the Court of Appeals with regard to the statute.

MR. MILLER: Your Honor, there is presently pending an obligation to brief the last order of your Honor in the Court of Appeals. I think the date is in December, although Mr. Lewittes has indicated a brief extension will be requested because the record has not yet been prepared and sent to the Court of Appeals. When the case comes before the Court of Appeals, I am sure that it will include argument on the issue of jurisdiction because we all know very well that an issue of jurisdiction should always be raised at any point when it appears in litigation.

THE COURT: There is an actual motion made which is on appeal?

MR. MILLER: Yes. The motion that is on appeal I don't think raised the issue that has now been raised.

THE COURT:You are talking about the statutory point?

MR. MILLER: Yes. If the effect of that repealer statute, as we believe the case to be, ousted the case of any jurisdiction to issue any retroactive relief, that act supervenes any of --

THE COURT: I agree. What you are saying, to make a long story short, you will present that proposition to the Court of Appeals?

MR. MILLER: Yes.

THE COURT: What is your view of the point that Mr. Imberman raises? After all, we all have in a sense a common interest in not confusing the issues any more than necessary.

MR. MILLER: The state has that interest and the state also has an interest in not being forced to make any substantial payments that it is not obligated to make.

THE COURT: What you are saying is: Judge, we are going before the Court of Appeals with this. We still ask you to decide it. You might decide it in our favor. If you do decide it in our favor, that would be what we are trying to get. If you don't decide it in our favor, we can still ask the Court of Appeals for their view of the matter.

MR. MILLER: In a sense, that's right.

I want to point out there were further proceedings pending in this court, notwithstanding the appeal. That's one of the reasons I think it is important for this court to decide the issue --

THE COURT: Those issues would not be pending if the Court of Appeals -- even if I didn't decide this pending motion -- should agree with you that the new statute should divest the court of jurisdiction?

MR. MILLER: One of the attorneys for the hospitals group pointed out the severe distress of his clients. I think that phrase may well equally describe the status of the State of New York, which as a very vital interest as to the taxpayers not being required to pay out even for a limited period of time in a budget crises thirty or forty million dollars which it is not obligated to pay. Since that is facing us --

THE COURT: I agree with you. Whoever is entitled to this money is entitled to it.

MR. MILLER: There's another reason I might add, your Honor. The motion also goes to the scope of the remaining issues in the case. The disposition of that motion would also --

THE COURT: I haven't looked at the motion, so I don't know what you mean.

MR. MILLER: The point of the motion is with the repealer of the waiver, we think the law is that the only issues that can be raised even on a prospective basis are constitutional issues. If that be the case, that would substantially change the nature of the issues now pending for the future aspect of the case and which are now being discovered and prepared for trial.

THE COURT: If I understand, your theory is that the statute, in effect, deprives the court of jurisdiction altogether or am I wrong on that?

MR. MILLER: We acknowledge that the court has jurisdiction under the ex parte Young case to enjoin state officials who are found to have engaged in unconstitutional violation.

THE COURT: Not to collect any money?

MR. MILLER: That's correct.

MR. IMBERMAN: I don't want to debate the merits of this motion, your Honor. There is a serious question in my mind that if you have not been deprived of jurisdiction by reason of the fact that the state has taken an appeal from your order, so everything in relation to the applicability of these regulations is now in the Court of Appeals, including the question of jurisdiction. I think the fastest way to get the jurisdictional issue decided is by the Court of Appeals. No matter who loses, there is going to be an appeal, your Honor. We might just as well decide it all in the Court of Appeals.

THE COURT: Mr. Imberman, certainly that argument is not capricious. Nothing in this case is.

On the other hand, I don't think I can grant you two weeks to answer this motion. I think it should be granted, that you should promptly put down whatever your position is on paper, at least with regard to the question of whether I should determine this or not.

MR. IMBERMAN: Surely.

THE COURT: You have shown us how people's timetables can be trimmed.

I ask you to get your papers in no later than a week from now.

MR. IMBERMAN: We are right into the Christmas holiday. We have a four-day holiday coming in.

MR. MacHARG: We have the same problem.

MR. IMBERMAN: I planned to take a few days off, Judge. It can't be that urgent.

MR. ELSTON: Your Honor, if you would allow me a second. I don't even know whether this is appropriate.

I am concerned particularly about the processes of government that are going on relative to the hospitals in the city and particularly the Hospital Corporation.

THE COURT: We all must be, I should think.

MR. ELSTON: There's a real danger here that I see quite aside from the fiscal situation of the state of creating an environment in which people think they have money or institutions think they have money that will

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., MISERICORDIA HOSPITAL MEDICAL CENTER, BUFFALO GENERAL HOSPITAL, THE GENESEE HOSPITAL, and THE MOUNT SINAI HOSPITAL on behalf of themselves and all other nonprofit hospitals which are members of the HOSPITAL ASSOCIATION OF NEW YORK STATE, INC. and which are reimbursed for Medicaid services rendered to hospital patients,

Plaintiffs,

-against-

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, ROBERT P. WHALEN, as Commissioner of Health of the State of New York, PETER GOLDMARK, as Director of the Budget of the State of New York, HUGH L. CAREY, as Governor of the State of New York, and F. DAVID MATHEWS, as Secretary of the U.S. Department of Health, Education & Welfare,

Defendants.

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76 Civ. 2027
(MEL)

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JACOB IMBERMAN, being duly sworn, deposes and says:

1. I am a member of the firm of Proskauer Rose Goetz & Mendelsohn, attorneys for the plaintiffs herein. I submit this affidavit in opposition to the State defendants' motion to dismiss and in support of the plaintiffs' contention that this Court is without jurisdiction to consider the motion insofar as a decision would affect this Court's prior judgment with respect to the retroactive effect of the Medicaid reimbursement regulations.

2. The relevant facts and procedural history are summarized in the accompanying memorandum of law and will not be repeated here. This affidavit is submitted to place before this Court the following documents referred to in the accompanying memorandum of law:

Exhibit A -- August 2, 1976 judgment;

Exhibit B -- Transcript of November 15, 1976, pages 8-11.

Exhibit C -- State defendants' application for stay dated November 19, 1976;

Exhibit D -- Affidavit of Joel Lewittes, Esq., sworn to November 24, 1976;

Exhibit E -- Reply Affidavit of Joel Lewittes, Esq., sworn to December 7, 1976.

Dated: New York, New York
December 23 , 1976

Jacob Imberman
JACOB IMBERMAN

Sworn to before me this
23rd day of December, 1976.

Jeanette H. Cahn
Notary Public

JEANETTE H. CAHN
NOTARY PUBLIC, State of New York
No. 31-5569100
Qualified in New York County
Commission Expires March 30, 1978

OFFICE COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., MISERICORDIA HOSPITAL MEDICAL CENTER, BUFFALO GENERAL HOSPITAL, THE GENESEE HOSPITAL, and THE MOUNT SINAI HOSPITAL on behalf of themselves and all other non-profit hospitals which are members of the HOSPITAL ASSOCIATION OF NEW YORK STATE, INC. and which are reimbursed for Medicaid Services rendered to hospital patients,

Plaintiffs,

-against-

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, ROBERT P. WHALEN, as Commissioner of Health of the State of New York, PETER GOLDMARK, as Director of the Budget of the State of New York, HUGH L. CAREY, as Governor of the State of New York, and DAVID MATTHEWS, as Secretary of the U. S. Department of Health, Education & Welfare,

Defendants.

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U S DISTRICT COURT
FILED
JUL 30 1976
S. D. OF N. Y.

JUDGMENT

76 Civ. 2027

(Judge Lasker)

This action came on to be heard on Plaintiffs' amended complaint, the answer thereto of the Defendants' Philip L. Toia, Robert P. Whalen, Peter Goldmark and Hugh L. Carey ("State Defendants"), the answer to the complaint of the Defendant David Mathews sued herein as David Matthews, the motion and affidavits in support of and in opposition to the Plaintiffs' motion for a preliminary injunction, and the State Defendants' motion to dismiss the amended complaint; and the Court having heard oral evidence in open court, and all parties hereto having consented to having the trial of the first cause of action on the merits advanced and consolidated with the hearing on Plaintiffs' application for a preliminary injunction pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure; and the Court having determined that this action may be maintained as a Class action pursuant to Rule 23 of the Federal Rules of Civil Procedure; and the Court having made findings of fact and conclusions of law as part of its opinion dictated in chambers on July 29, 1976, which was transcribed by the Court Reporter; and it appearing to the Court that the State Defendants are committing acts, and are about to commit acts as set forth in Plaintiffs' amended complaint, and will continue to do so unless restrained by order of this Court, and that immediate and irreparable injury, loss or damage will result to Plaintiffs and the members of the Class as a result; and that Title XIX of the Social Security Act, 42 USC §1396 et seq. ("Medicaid Act") and the regulations thereunder require a state which receives federal funds under the federal Medicaid program to pay hospitals the reasonable cost of in-patient hospital services rendered to Medicaid patients in accordance with methods and standards developed by the State and approved in advance of implementation by the Secretary of Health, Education and Welfare ("Secretary") as part of the state's Plan for Medical Assistance; and that New York State is receiving federal funds under the federal Medicaid program; and that the State Defendants are implementing three regulations - 10 NYCRR §§86.14(b), 86.21(k) and 86.26 in the calculation of Medicaid reimbursement rates for in-patient hospital services rendered on and after January 1, 1976, and that none of these regulations have been approved by the Secretary as part of New York's State Plan for Medical

Assistance ("New York State Plan"); and that the implementation of these regulations has caused and will cause immediate and continuing irreparable injury, loss or damage to Plaintiffs and the members of the Class; and that the State Defendants will continue to implement these three regulations unless enjoined; therefore it is ORDERED AND ADJUDGED:

That so long as New York State participates in the federal Medicaid Program, the State Defendants and their successors, officers, agents, servants and employees are ordered to comply with 42 U.S. 1396a(a)(13(D) + 45 CFR 250.30 ~~all federal laws and all rules and regulations of the Secretary applicable to the New York Medicaid program including~~ not is, the requirement of pre-implementation approval by the Secretary of any amendment to the New York State Plan affecting reimbursement for in-patient hospital services and the requirement that hospitals be reimbursed for such services in accordance with the New York State Plan approved by the Secretary pursuant to the Medicaid Act; and

wrl

That 10 NYCRR §§86.14(b), 86.21(k) and 86.26 and the in-patient Medicaid reimbursement rates promulgated thereunder for Plaintiffs and members of the Class are unlawful; and the State Defendants and their successors, officers, agents, servants and employees are permanently enjoined from applying or attempting to apply said regulations to in-patient hospital reimbursement rates for services rendered by Plaintiffs and members of the Class to Medicaid patients on or

because the regulations have not been approved by the Secretary until the said Regulations have been approved by the Secretary

after January 1, 1976; and

That the State Defendants and their successors, officers, agents, servants and employees promptly recompute and pay reimbursement rates for in-patient Medicaid services rendered on and after January 1, 1976 in accordance with the approved New York State Plan and that until such recomputation and payment is complete that they continue to pay ~~those~~ ~~hospitals for whom the 1976 rates promulgated on July 1, 1976~~ ~~are higher than their 1975 rates at the level of the higher~~ ~~rates, and that they pay those hospitals for whom the 1976~~ ~~rates promulgated on July 1, 1976 are lower than their~~ 1975 ~~rates at the level of their December 31, 1975~~ rates.

The plaintiffs and the members of the class until the rates promulgated by the State defendants on July 1, 1976

The First Cause of Action is hereby severed,

No execution shall issue and no proceeding shall be taken to enforce this judgment until the expiration of ~~20~~ 12 days after its entry.

Dated: New York, New York
July 30, 1976

Morris E. Lasker
UNITED STATES DISTRICT JUDGE

JUDGMENT ENTERED - 8/2/76
Raymond F. Burghardt
CLERK

rmjw

THE COURT: I think the change of venue is a brilliant suggestion.

MR. LEWITTES: I thought you might, your Honor.

MR. IMBERMAN: It is very cold in the Northern District in the wintertime, Judge.

MR. LEWITTES: Without any explanation why the idea was not prosecuted by Mr. Fine, I simply noted he did file an answer and put in the affirmative defense of change of venue which in my view is not proper, necessarily, as an affirmative defense, but since change of venue may be brought at any time within reasonable time, we think it is proper now particularly in the light of, number one, possible stay of the trial itself and, number two, the proposed intervention at this point by New York City Health and Hospitals Corporation.

THE COURT: It is not quite accurate to say intervention, but appearance for the first time.

MR. LEWITTES: We do, by the way, have with us today notices of motion for change of venue with a memorandum of law.

One question has arisen and it came to my attention just a few minutes before I left the conference today:

Mr. O'Connor, of the United States Attorney General's office, informed me the statute dealing with waiver by the state, waiver of immunity, that statute which is public law 94-Section 111-A, which Congress required any state which received federal funds under the Medicaid Plans to waive its immunity to suit under the Eleventh Amendment to the Constitution, has, according to Mr. O'Connor, been repealed effective January 1, 1976, is that correct?

MR. O'CONNOR: Yes.

THE COURT: January 1, 1976?

MR. O'CONNOR: This was all prefaced by the fact that it is my understanding. I have not investigated this completely. I was passing notification on to Mr. Lewittes.

MR. LEWITTES: Assuming that to be true only, there is --

THE COURT: You mean only assuming?

MR. LEWITTES: Assuming arguendo only, there is a question arising again as to federal jurisdiction.

We had raised that issue in our motion to dismiss, it was held against us --

THE COURT: Decided against you.

MR. LEWITTES: Yes, but we feel it may be an issue now because there may be lack of jurisdiction because of that repeal.

THE COURT: May I ask what the source of your information to date is, Mr. O'Connor?

It comes as a surprise that this should not have been known at the time this issue was crystallized.

MR. O'CONNOR: I have a page from the statutes by itself, submitted to me, and from my reading of that xerox page and the information passed to me by the regional attorney of the HEW my understanding was that the statute demanding a state to consent to suit, as far as the Medicaid Plan, had been repealed by Congress and, in addition to that, the effective date of the repeal is January 1, 1976.

THE COURT: Which would mean the repealing statute was passed before January 1, 1976?

MR. IMBERMAN: No, your HOnor, it didn't happen that way.

The President, according to the press reports-- I was not there -- signed the bill a couple of weeks ago but it is nowhere near as simple as counsel here state and it certainly doesn't go to jurisdiction.

THE COURT: At least we all know there is such a factor and you can comment on that when the time comes.

MR. LEWITTES: Trying to get back on the track, if I may, we do have with us today notices of motion for change of venue pursuant to Title 28 1406-A or, in the alternative, Title 28, 1404, Subdivision A, to change venue to the Northern District of New York.

I don't think there is any need to argue the substantive issues of that motion right now, or perhaps it is not in order as well.

However, the fact is we sincerely believe that part of the problem, and perhaps the core of the problem with discovery and pretrial discovery may be grounded upon the fact that there is improper venue, that proper venue should have been, could have been placed in Albany, in the Northern District, and that has caused the serious problem we face now with discovery because all the offices of the state, defendants are in Albany, all the state defendants reside in Albany, all the records reside in the offices of these departments in Albany and doubtless all the witnesses reside in the Northern District, in Albany County.

THE COURT: I agree with you that it is inappropriate, except for a threshold showing, to discuss the merits of the venue question, but I wonder whether

STATE OF NEW YORK
DEPARTMENT OF LAW
TWO WORLD TRADE CENTER
NEW YORK, N.Y. 10047
TELEPHONE: ~~488-3323~~
488-3391

OUIS J. LEFKOWITZ
ATTORNEY GENERAL

SAMUEL A. HIRSHOWITZ
FIRST ASSISTANT
ATTORNEY GENERAL

November 19, 1976

Hon. Morris E. Lasker
United States District Court
Southern District of New York
United States Courthouse
Room 1903
Foley Square
New York, New York 10007

Re: Hospital Association of N.Y.S., et al.
v. Toia

Dear Judge Lasker:

Please consider this as an application for a stay of your order of November 5, 1976, entered in the office of the Clerk of the Court on November 9, 1976 pending appeal to the United States Court of Appeals for the Second Circuit. A Notice of Appeal is being filed this day. I am moving for an expedited appeal in the Court of Appeals.

Mr. Imberman, by letter to me dated November 18, 1976, received by me today, has stated that I informed this Court that a Notice of Appeal had been filed. If I did it was upon my erroneous assumption at the time, frankly because of my unfamiliarity with that aspect of the case, that the remand to you and your decision on retroactivity was subsumed under the original Notice of Appeal. This erroneous assumption was also based upon the caption of Mr. Fine's memorandum of law to this Court on retroactivity, a copy of which is annexed hereto, which sets forth the appeal caption.

A search and study by me of the files of Mr. Fine since that time has indicated to me a clear requirement on my part to file a separate Notice of Appeal

Respectfully yours,

LOUIS J. LEFKOWITZ
Attorney General
By

JOEL LEWITTES
Assistant Attorney General

JL:mlh
Encl.

cc: Jacob Imberman, Esq.
c/o Proskauer, Rose, Goetz
& Mendelsohn
300 Park Avenue
New York, New York 10022

Robert B. Fiske, Jr., Esq.
United States Attorney for
the Southern District of New York
1 St. Andrews Plaza
New York, New York 10007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

--X

HOSPITAL ASSOCIATION OF NEW YORK STATE, :
INC., et al.,
:
Plaintiffs-Appellees,
:
- against -
: 76 Civ. 2027
PHILIP L. TOIA, et al., (Judge Lasker)
:
Defendants-Appellants,
:
- and -
:
DAVID MATTHEWS,
:
Defendant.

--X

MEMORANDUM OF LAW OF RESPONDENTS
RESPECTING REGULATIONS 86.14(b)
AND 86.21(k), APPROVED BY HEW
ON AUGUST 16, 1976.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for State Defendants
Office & P. O. Address
Two World Trade Center
New York, New York 10047
Tel. (212) 488-3391

JESSE J. FINE
Assistant Attorney General
of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

--X

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., MISERICORDIA HOSPITAL MEDICAL CENTER and BUFFALO GENERAL HOSPITAL, THE GENESEE HOSPITAL and THE MOUNT SINAI HOSPITAL, on behalf of themselves and all other nonprofit hospitals which are members of the HOSPITAL ASSOCIATION OF NEW YORK STATE, INC. and which are reimbursed for Medicaid Services rendered to hospital patients,

Plaintiffs-Appellees,

- against -

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, ROBERT P. WHALEN, as Commissioner of Health of the State of New York, PETER GOLDMARK, as Director of the Budget of the State of New York, HUGH L. CAREY, as Governor of the State of New York,

Defendants-Appellant,

- and -

DAVID MATTHEWS, as Secretary of the U.S. Department of Health, Education & Welfare,

Defendant.

--X

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JOEL LEWITTES, being duly sworn, deposes and says:

1. I am an Assistant Attorney General in the office of LOUIS J. LEFKOWITZ, Attorney General of the State of New York, attorney for appellants herein. I submit this affidavit in support of the instant application for a stay pending appeal.

2. Annexed hereto is a copy of the notice of appeal (Exhibit "A") and a copy of the order below from which appellants are appealing (Exhibit "B").

3. An application for a stay of said order was made on November 19, 1976 to Hon. Morris E. Lasker, United States District Judge. No official response has been made or received. In view of the urgency of this application, appellants maintain that relief in the District Court is not practicable. Four of the state's highest officials may be subject to contempt proceedings unless the instant stay application is permitted to be brought before the Court.

4. On July 30, 1976 the Court below (Lasker, J.) in a judgment entered in the District Court Clerk's office on August 2, 1976 granted a preliminary injunction prohibiting appellants from implementing without prior HEW apporval three new State regulations, 10 N.Y.C.R.R. §§ 86.21(k), 86.14(b), and 86.26, which govern aspects of State reimbursement to hospital participants in the Medicaid program. This Court, on August 17, 1976 denied appellants a further stay of the August 2, 1976 judgment (Exhibit "C") (the District Court had granted a stay of enforcement of its enforcement for 12 days after its entry) but remanded for a determination of whether or not HEW's approval of two of the regulations on August 16, 1976, subsequent to the grant of injunctive relief rendered them retroactively effective.* (Exhibit "D")

5. By judgment dated October 15, 1976 the District Court granted state defendants a stay pending determination by it of the retroactive effect of said approval by HEW upon the express acceptance by the State defendants by letter dated October 1, 1976 of the condition that as to any payments as to which the stay applies, such payments if hereafter required to be paid shall be paid by the state defendants to the members of the

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*A third amendment, 10 NYCRR § 82.26 was separately submitted by the State to HEW and was approved by HEW on October 4, 1976.

plaintiff class together with interest thereon at the legal rate in New York from September 28, 1976 to the date of payment. (Exhibit "E")

6. Subsequent to all of the submissions by the parties to the District Court on the remanded issue of retroactivity, your deponent became involved in the case by reason of the retirement of my predecessor.

7. On November 5, 1976 the District Court, in an order entered in the office of the Clerk of the District Court on November 9, 1976, concluded that the regulations which were the subject of the preliminary injunction entered on August 2, 1976 may not be retroactively applied by the State to the period commencing January 1, 1976 but may be applied only from the date on which they were approved by HEW.

8. Appellees, pursuant to the term of the November 5, 1976 order are entitled to, in essence, recoup payments at the rate under the payment methods in effect prior to new rate methods as subsequently approved by HEW.

9. It is noteworthy that appellants prior to the August 2, 1976 judgment granting preliminary relief moved to dismiss the complaint _inter alia_ on the ground that Public Law 94-82, Section 111 (which required State under the Medicaid system to consent to allow suit in the federal Court by or on behalf of providers of in-patient hospital services with respect to payment of reasonable costs of such services, furnished for any period after June 30, 1976 pursuant to Section 1902(a)(13)(D) of the Medicaid Act) was unconstitutional. The District Court on July 29, 1976 denied said motion relying upon the Supreme Court decision in _Employees_ v. _Missouri Public Health Dept_., 411 U.S. 279 (1973) for the proposition that Congress has the right to provide that a state may be sued. (Transcript July 29, 1976 pp. 12-15)(Exhibit "F")

10. On or about November 17, 1976 your deponent was informed for the first time that the provision for state waiver of consent to be sued was repealed by Public Law 94-552 and signed by the President of the United States on October 18, 1976. This repeal was made effective January 1, 1976 about five months prior to institution of the instant action. A copy of said repealing legislation is annexed hereto as Exhibit "G".

11. The State is insulated from a suit for damages under the Eleventh Amendment to the United States Constitution. Appellees here seek and have been granted by the Court below recoupment of moneys allegedly due them under the reimbursement rate under the former state regulation prior to HEW's approval of the new state reimbursement formula.

12. In suits seeking recovery of retroactive benefits the immunity of the Eleventh Amendment must be given full force. Edelman v. Jordan, 415 U.S. 651, rehearing denied, 416 U.S. 1000 (1974).

13. Characterization of the relief as a "refund" or "equitable restitution" rather than damages does not dictate a different result. Ford Motor Co. v. Dept. of Treasury, 323 U.S. 459. Clearly, the substantive nature of the remedy sought controls, not the formal label attached to it. Indeed this Court similarly noted in McAuliffe v. Carlson, 520 F. 2d 1305, 1308 (2d Cir. 1975) that "whether the payment is called damages, retroactive payment or restitution, the effect upon the fisc is the same."

14. Unless the order appealed from is stayed the mandated retoractive payment at the former rates would create a serious drain upon an already overburdened state budget in a case where the underlying jurisdictional basis therefor is indeed questionable. To be sure, state defendants are presently preparing a motion to dismiss for lack of subject matter jurisdiction in the District Court.

15. In the event this Court were to grant a stay appellants would undertake to prosecute this appeal in an expeditious fashion.

16. No previous application for this or similar relief has been made to this Court, or to any Judge thereof except as indicated above.

WHEREFORE, it is respectfully requested that this application be granted.

Joel Lewittes
JOEL LEWITTES

Sworn to before me this
24th day of November, 1976

Nicholas G Garanti
Dep. Assistant Attorney General
of the State of New York

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

HOSPITAL ASSOCIATION OF NEW YORK
STATE, INC., et al.,

Plaintiffs-Appellees,

-against-

PHILIP L. TOIA, as Commissioner of
Social Services of the State of
New York, et al.,

Defendants-Appellants,

-and-

DAVID MATHEWS, as Secretary of the
U.S. Department of Health, Education
and Welfare,

Defendant.

REPLY AFFIDAVIT

76-6117

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

JOEL LEWITTES, being duly sworn, deposes and says:

1. I am an Assistant Attorney General in the office of LOUIS J. LEFKOWITZ, Attorney General of the State of New York, attorney for the state defendants-appellants herein.*

2. I submit this affidavit in reply to the affidavit in opposition to appellants' motion for a stay pending appeal of an order filed November 9, 1976 by the Court below (Lasker, J.).

3. As quite properly observed by appellees in their affidavit in opposition the state defendants' motion is indeed based upon Pub. L. No. 94-552 which repealed, retroactive to January 1, 1976, the Medicaid Act requirement that participating

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* The four state defendants-appellants as set forth in our moving papers are: Philip L. Toia, Commissioner of Social Services of the State of New York, Robert P. Whalen, Commissioner of Health of the State of New York, Peter Goldmark, Director of the Budget of the State of New York and Hugh L. Carey, Governor of the State of New York.

states waive their Eleventh Amendment immunity.

4. On December 8, 1976, two weeks subsequent to the instant motion for a stay, the deletion of the Medicaid Act requirement of state consent to be sued from the State Plan was approved by the Department of Health, Education and Welfare, effective January 1, 1976. A copy of this approval is annexed and made a part hereof as exhibit "A". This disposes of appellees' allegation that the consent to suit and waiver is still validly in effect (Paragraph 4 of the Imberman Affidavit herein).

5. As indicated in appellants' motion for a stay before this Court, the issue squarely presented here is the bar of the Eleventh Amendment against the recovery of retroactive payments from the state defendants sued only in their official capacities ordered below.

6. The bar of the Eleventh Amendment here of course raises a substantial question with respect to the jurisdiction of the Court below as to both prospective and retrospective relief. Accordingly, appellants have moved below to dismiss appellees' second amended complaint for lack of subject matter jurisdiction. This motion is returnable before District Judge Lasker on December 17, 1976. A copy of appellants' memorandum of points and authorities in support of their motion to dismiss is submitted herewith and made a part hereof as exhibit "B". The arguments set forth therein, subdivisions I and II thereof (pp. 4-12) are directly applicable here and, we maintain, dispositive in favor of appellants' instant motion before the Court. Accordingly, Exhibit "B" should properly be read and considered by this Court on this motion.

7. In a demonstrably weak attempt to penetrate the absolute Eleventh Amendment bar applicable to the relief granted

below, appellees contend that the state has waived its immunity. Appellees "waiver" argument is wholly without merit, is clearly unjustified and should be totally rejected by this Court for the following reasons:

> (a) appellees outrageously argue "that the repealing legislation was made retroactive for the sole purpose of voiding the penalty provision."* (Appellees' memo of law, p. 18). Thus appellees contend that the expressed congressional desire was to prevent a state from being penalized for its failure to execute a consent to suit and waiver which also made it necessary to repeal the law retroactively.
>
> In short, appellees perversely would have this Court hold that a state which flatly refused to waive its consent to be sued in the face of statute requiring waiver would be rewarded for its recalcitrance by being permitted to benefit from the repealing legislation while New York, which obeyed the law of the land by waiving its consent to sue (admittedly under protest), should be punished by having this Court not extend to it the umbrella of immunity per-

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* The terms of 42 U.S.C. § 1396a(1) provided that any state which had not executed a consent to suit by the end of the first quarter of 1976 would have been subjected to a 10 percent reduction in medicaid payments mandated by that provision.

mitted by the repealing legislation.*

Appellees' argument is not only specious but totally unworthy of them.

Finally, in this regard appellees argue that the repealing legislation does not amount to a congressional ouster of federal court jurisdiction as to lawsuits already commenced. This argument similarly is without merit. There is no savings clause in the repealing legislation involved here. Compare with the repealing legislation by Congress of the three-judge court provision where Congress specifically provided in Section 7 thereof that

> "This section provides that the act shall not apply to any action commenced on or before the date of enactment. It is merely added to make clear that cases filed prior to the enactment of this bill shall proceed to final disposition under the law existing on the date they were commenced." (Pub. L. 94-381, Section 7).

See also: De La Rama Steamship Co., Inc. v. United States, 344 U.S. 386, 390.

(b) appellees next attempt to construct a waiver by the state by resorting to a colloquoy between District Judge Lasker and former Assistant Attorney General of New York Jesse Fine in an in-chamber conference on July 28, 1976. There the Court asked:

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* The three primary reasons for the retroactive repeal are clearly set out in the House Report (exhibit "H" to appellees' affidavit herein) at pp. 4-5: to prevent the "unreasonable burden of suits" from falling on states which did, under protest, comply with section 111(a); to prevent the imposition of a "substantial penalty bear[ing] little relation to any substantive question relative to the[se] states' administration of the medicaid program" on states which refused to comply; and because Congress had "serious questions . . . concerning the constitutionality of the provision."

"Can I have a representation, or do I have a representation from the state that if the court finds that the state procedures are invalid and if the state is nevertheless not enjoined but later on is found to owe money to the hospitals, that it will not raise the Eleventh Amendment as a defense to any suit by the hospitals to secure that money?

"MR. FINE: I think I can make that statement, your Honor." (Exhibit "H" annexed to appellees' affidavit in opposition).

This is indeed poor folder upon which to demonstrate a waiver of the Eleventh Amendment by the state appellants herein.

It is inconceivable to claim that Mr. Fine's statement, "I think I can make that statement, your Honor," can, in any manner be construed to evidence a waiver by the State of its immunity under the Eleventh Amendment. As the Court observed in Edelman v. Jordan, 415 U.S. 651, rehearing denied, 416 U.S. 1000 (1974):

> "In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction...'" Id. at 673 (citation omitted).

Indeed this Court in *Rothstein* v. *Wyman*, 467 F. 2d 226 (2d Cir., 1972) *cert. denied*, 411 U.S. 921 (1973) refused to find a waiver of the Eleventh Amendment in a statement made by a lawyer for the Department of Social Services in an affidavit submitted to a three-judge court in opposition to the grant of a preliminary injunction which set forth that ". . . maintenance of welfare payments at present levels would result in no irreparable harm to plaintiffs since any sums ultimately found to be owing them could be disbursed at that time." *id.* at 238. As this Court quite properly noted the quoted statement in an affidavit "hardly represents an authoritative formulation and declaration of state policy. More significantly, however, it is subject to varying interpretations which prevent it from being the kind of clear and purposeful waiver which the Supreme Court has required in this context." *id.* at 239. Similarly in the case at bar, Mr. Fine's statement in chambers to the District Judge that he "thinks . . . [he] can make that statement . . ." is subject to varying interpretations including the obvious one: that he believes he can make that statement but that he is not clear that he is authorized to make it. In any event, as this Court observed in *Rothstein*, *supra*, it does not fall within the strict requirement of waiver set forth in *Edelman*, *supra*.*

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* It is noteworthy that the Court in fact did *enjoin* the State, by judgment dated August 2, 1976 from implementing the state regulations. Appellees' reliance upon *Vargas* v. *Trainor*, 508 F. 2d 485, 492 (1974) for the proposition that an unequivocal waiver by the State of its Eleventh Amendment immunity in a memorandum to the Court is not withdrawn by reason of the "Court's subsequent issuance of the injunction despite the representation does not change, or release defendant from honoring the representation is misplaced here since first, there is no unequivocal waiver here and second, to the extent that *Vargas* could be interpreted by the *Vargas* Court to cover Mr. Fine's statement here, *Vargas* is contrary to the Court's holding in *Rothstein*, *supra*, and should be disregarded.

Finally, in this connection, assuming *arguendo only* that the Fine statement does amount to a waiver, such waiver could apply *only* from the period from July 28, 1976 to the date of approval by H.E.W., August 16, 1976 of the significant and major portion of the State's new regulations.*

> (c) appellees' final claim of waiver is erroneously founded upon the state defendants' agreement to pay interest on any monies ultimately determined to be retroactively due in exchange for a stay of the order requiring payments to the hospital appellees pending the determination of the retroactively issue. No waiver can possibly be inferred from this where at the time of the agreement, an existing congressional fiat requiring waiver of the state's Eleventh Amendment rights. Appellees' argument here would allow them to have their "cake and eat it" at the same time. If the State did not agree to the payment of interest in exchange for a stay, appellees would move for a contempt order; on the other hand, by agreeing to the interest payment appellees claim the State has waived its immunity. This hardly evinces an unequivocal statement of waiver required by *Edelman*.

3. It is abundantly clear from appellants' moving papers and their instant reply affidavit that the Eleventh

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* A third amendment to the state plan, 10 N.Y.C.R.R. § 82.26 was separately submitted by the State to H.E.W. and was approved by H.E.W. on or about October 4, 1976.

Amendment totally bars the relief granted appellees below with respect to retroactive payments and that there was no waiver by the State either in law or fact of its Eleventh Amendment right.

WHEREFORE, appellants respectfully request that a stay of the November 5, 1976 order below be granted, and for such other and further relief that this Court may deem just and proper.

Joel Lewitte

JOEL LEWITTES

Sworn to before me this
13th day of December, 1976

/s Judith A. Gordon

Assistant Attorney General
of the State of New York

☆ U.S. GOVERNMENT PRINTING OFFICE — 1974-

ARTMENT OF HEALTH, EDUCATION, AND WELFARE
IAL AND REHABILITATION SERVICE
ington, D. C. 202

Submit 6 Copies

TRANSMITTAL AND NOTICE OF APPROVAL OF STATE PLAN MATERIAL SOCIAL AND REHABILITATION SERVICE STATE PLAN PROGRAMS

REGIONAL COMMISSIONER
SOCIAL AND REHABILITATION SERVICE
DEPARTMENT OF HEALTH, EDUCATION, & WELFARE
REGION

TRANSMITTAL NUMBER
76-57

STATE
New York

PROGRAM IDENTIFICATION
XIX

E OF PLAN MATERIAL (CHECK ONE)
NEW STATE PLAN
AMENDMENT TO BE CONSIDERED AS NEW PLAN
AMENDMENT

PROPOSED EFFECTIVE DATE
January 1, 1976

PLETE NEXT 4 BLOCKS IF THIS IS AN AMENDMENT *(Separate transmittal for each amendment)*

ERAL REGULATION CITATION
P.L. 94-5

ER OF THE PLAN SECTION OR ATTACHMENT
24a

NUMBER OF THE SUPERSEDED PLAN SECTION OR ATTACHMENT
Page 24a

OF AMENDMENT
State Consent to Suit - Section 4.28 - deleted.

RNOR'S REVIEW (CHECK ONE)
GOVERNOR'S OFFICE REPORTED NO COMMENT
COMMENTS OF GOVERNOR'S OFFICE ENCLOSED
NO REPLY RECEIVED WITHIN 45 DAYS OF SUBMITTAL.
☐ OTHER, AS SPECIFIED:

ATURE OF STATE AGENCY OFFICIAL
D Philip L. Toia
E: Commissioner
December 7, 1976
RN TO: NYS Department of Social Services
1450 Western Avenue
Albany, New York 12243

FOR REGIONAL OFFICE USE ONLY
DATE RECEIVED DEC [illegible] 1976
DATE APPROVED DEC 1976
PLAN APPROVED - ONE COPY ATTACHED
EFFECTIVE DATE OF APPROVED MATERIAL
SIGNATURE OF REGIONAL OFFICIAL
TYPED NAME: William Toby
TITLE: Acting Regional Commissioner
REMARKS

EXHIBIT "A"

ENDORSEMENT

HOSPITAL ASSOCIATION OF NEW YORK STATE INC., et al., Plaintiffs, v. PHILIP L. TOIA, et al., Defendants. 76 Civ. 2027

LASKER, D.J.

The State defendants move to dismiss for lack of subject matter jurisdiction on the grounds that the relief still sought and previously awarded is barred by the Eleventh Amendment. The motion is based on the proposition that the effect of the statute passed by Congress October 18, 1976, Pub. L. No. 94-552, repealing 42 U.S.C. §1396a(g) which formerly required the State to waive its Eleventh Amendment immunity, is retroactive and bars past and future money judgments.

In ordinary circumstances, the court would, of course, entertain a motion to dismiss on these grounds at any stage of the proceedings. The circumstances here, however, are far from ordinary. Prior rulings of this court are presently on appeal before the Court of Appeals, including the Eleventh Amendment argument put to this court. Indeed, on an earlier application to the Court of Appeals for a stay pending appeal from the earlier rulings of this court, the State defendants argued as a ground for the stay the very proposition now put before this court, and the Court of Appeals nevertheless refused a stay.

It is suggested that in spite of the extraordinary posture of the case, the motion should, nevertheless, be entertained by this court pursuant to a line of cases relating to the provisions of Rule 60(b) of the Federal Rules of Civil Procedure.

The argument runs as follows: The instant motion may be regarded as a motion under Rule 60(b) which authorizes the court to vacate a judgment for mistake, voidness, or "for any other reason justifying relief from the operation of the judgment." It is next contended that the Court of Appeals of this circuit has ruled in Ryan v. United States Lines Co., 303 F.2d 430 (2d Cir. 1962) that where a Rule 60(b) motion is made to the District Court while an appeal in the case is pending, the preferred course is for the District Court "first to determine whether it would grant the motion; if it decides in favor of it, then and then only is the necessary remand by the Court of Appeals to be sought." 303 F.2d at 434.[1]

There is no doubt that the Ryan rule is an efficient device for the determination of matters in such a posture when the issue is whether the District Court would or would not have issued the judgment in question if the facts were other than existed at the time the original judgment was entered. Here, however, the question put both to the District Court and the Court of Appeals is one purely of law. It is plain that the binding decision will be made by the Court of Appeals since even if the District Court were to act the losing side would appeal. That being so, the interest of judicial economy would not be served by the District Court rendering an advisory opinion on a matter of law to the Court of Appeals.

Although in fact we decline to entertain the motion, for the purpose of clearing the docket the motion is denied.

It is so ordered.

Dated: New York, New York
January 25, 1977

MORRIS E. LASKER
U.S.D.J.

---

1. We disagree with plaintiffs' contention that Weiss v. Hunna, 312 F.2d 711 (2d Cir. 1963) and Diapulse Corp. v. Curtis Publishing Co., 374 F.2d 442 (2d Cir. 1967) disapprove the procedure recommended in Ryan, supra.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

------------------------------------- x

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., et al., :

Plaintiffs, :

-against- : 76 Civ. 2027

PHILIP TOIA as Commissioner of Social Services of the State of New York, :

Defendants.

------------------------------------- x

Before:

HON. MORRIS E. LASKER,
District Judge

New York, February 3, 1977
Room 1903 - 9:50 a.m.

APPEARANCES:

M.WILLIAM SCHERER, Esq.,
Attorney for Plaintiffs other than Health & Hospitals Corp.

PETER F. NADEL, Esq.,
STEPHEN L. RATNER, Esq.,
Attorneys for Plaintiff Health & Hospitals Corp.

CHARLES MILLER, Esq.,
EARL COLLIER, Esq.,
Attorneys for the Defendants.

JOHN O'CONNOR, Esq.,
Attorney for Federal Defendant Mathews

raised as to the third, question, this one we are now discussing, cost exclusion, is more difficult than the first two points which I think you understand my position on.

THE COURT: I see what you are saying.

MR. MILLER: Since you authorized and required the use of this system in 1976, how could you say you have done it in any way -- there is force to that argument. I am foolish to deny it.

THE COURT: You say that applies only to Point 3?

MR. MILLER: That's the only thing that --

THE COURT: Let me ask you q eustion, and then two minutes for Mr. Nadel if he wants to say anything.

If this motion would be regarded as a motion for summary judgment which is the thing that makes snese to me, do you think that there are any factual issues that would prevent determination of it, I am not talking about which way it would be determined.

MR. MILLER: The answer is yes, your Honor, I do. I found throughout Mr. Nadel's reply affidavit factual assertions which I have not had an opportunity to consider with our clients and discuss whether they would agree with them or not. I cannot tell you now whether those -- I am certain there are going to be some factual issues because in some cases they take issue with certain statements made by Mr. Mc Cann, not statements on the latter point, but other statements which I think are relevant.

Secondly, I think a jurisdictional bar applies here, your Honor. You are talking about a retroactive order.

THE COURT: I know --

MR. MILLER: Which your Honor has now decided for reasons that it was before the Court of Appeals. Those reasons would not apply, so I would think that any summary judgment would have to at least await the outcome of the disposition of the Court of Appeals of the jurisdictional question.

THE COURT: Do you mean this branch of the case is not in the same posture as the other hospitals, the other three regulations, is that correct?

MR. MILLER: To the extent you have already ruled, and on the aspect of your ruling which is on appeal, we have raised a jurisdictional defense that will be decided by the Court of Appeals.

THE COURT: That's been argued, hasn't it?

MR. NADEL: No, it's been adjourned.

MR. MILLER: Until February 28th.

THE COURT: That makes life simpler.

MR. MILLER: We are hoping for some instruction from the court, but I guess we will have to wait.

THE COURT: Yes.

MR. MILLER: I feel constrained to say one more thing which I think is worth mentioning.

You alluded to concern that you might have that the state was still, in your terms, stonewalling.

THE COURT: I did also go farther than letting it go at that phrase. The phrase had been used here before. I did use it, but I also hoped that I made clear: that I felt the state has the right to exercise its full power and to protect itself properly.

MR. MILLER: The point I want to make here is that I want to invite your attention to that portion of our paper and Mr. Mc Cann's affidavit which points out why, in his view, the state has tried to be fair and deal properly and if not generously with the HHC in establishing the basis of its rates.

As long as we are counsel to these defendants, they will not stonewall this court.

THE COURT: Thank you for telling me that.

Q Isn't it true that the reason why the amendments were approved was because of the appeal process operating in conjunction with the ceiling regulation, isn't that a fact?

MR. O'CONNOR: I will object to that and direct the witness not to answer.

You are going far beyond the scope of the order which says what facts or evidence were relied upon. You are asking about the mental processes. Why did he do this, you are asking him.

MR. IMBERMAN: He already testified to that, Mr. O'Connor.

Q Isn't it a fact that HEW relied on the appeal process in order to approve the average ceiling, 86.14?

A The appeals process was felt to be an integral part of the entire methodology.

Q It was through the appeals process that HEW felt the hospital could get reasonable cost reimbursement if it was unfairly penalized by the operation of the ceiling?

A That is correct.

Q What I want to know then is whether you considered that the hospital having to wait for the appeal

UNITED STATES COURT OF APPEALS FILED MAR 16 1977 A. DANIEL FUSARO, CLERK SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

For the Second Circuit

Nos. 840, 841 - September Term 1976

Argued February 28, 1977 Decided March 16, 1977

Docket Nos. 76-6117, 76-6183

76-6117
76-6183

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., MISERICORDIA HOSPITAL MEDICAL CENTER and BUFFALO GENERAL HOSPITAL, THE GENESEE HOSPITAL, and THE MOUNT SINAI HOSPITAL on behalf of themselves and all other nonprofit hospitals which are members of the HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., and which are reimbursed for Medicaid Services rendered to hospital patients,

Plaintiffs-Appellees,

-against-

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, ROBERT P. WHALEN, as Commissioner of Health of the State of New York, PETER GOLDMARK, as Director of the Budget of the State of New York, HUGH L. CAREY, as Governor of the State of New York,

Defendants-Appellants.

-and-

DAVID MATHEWS, As Secretary of the U.S. Department of Health, Education & Welfare,

Defendants.

Before MANSFIELD, MULLIGAN and OAKES, Circuit Judges.

Appeal from orders entered in the United States District Court for the Southern District of New York, Hon. Morris E. Lasker, Judge, requiring defendants to recompute and to pay reimbursement rates for in-patient Medicaid services from January 1, 1976 until the time of HEW approval of the new New York State regulations.

Remanded.

JACOB IMBERMAN, New York, New York (Proskauer Rose Goetz & Mendelsohn, New York, New York, Steven S. Miller, Robert M. Kaufman, M. William Scherer, Susan Rosenfeld, of Counsel), for Plaintiffs-Appellees.

ROBERT N. SAYLER, Special Assistant Attorney General (Louis J. Lefkowitz, Attorney General for the State of New York, Irvin Finkelstein, Assistant Attorney General; Charles A. Miller, Patricia A. Barald, Special Asst. Attorneys General, Covington & Burling, Washington, D.C., on the brief), for Defendants-Appellants Toia, Whalen, Goldmark and Carey.

PER CURIAM:

This is an appeal from orders entered in the United States District Court for the Southern District of New York by Hon. Morris E. Lasker on August 2 and November 9, 1976. In the judgment entered on August 2 the district court found that Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq. and the regulations thereunder require that the Secretary of Health, Education and Welfare (HEW) approve, as part of the state's Plan for Medical Assistance, the methods and standards developed by a state to pay hospitals the reasonable cost of in-patient hospital services in advance of their implementation. The district court found that three New York regulations, 10 N.Y.C.R.R. §§ 86.14(b), 86.21(k) and 86.26, used to calculate such reimbursement rates were illegal because the approval of the Secretary had not been secured prior to their implementation. The court permanently enjoined the defendants from enforcing these regulations until the Secretary approved them. In addition, the defendants were ordered to recompute the reimbursement rates for in-patient services and reimburse the plaintiffs at the previous rates for the period from January 1, 1976 when unapproved regulations went into effect until the time of HEW approval of the recent amendments.

On August 16, 1976, the day before argument was to be heard in the Court of Appeals on the defendants' motion for a stay pending appeal, the Secretary approved two of the proposed regulations, 10 N.Y.C.R.R. §§ 86.21(k) and 86.14(b). This court remanded the case to the district court to determine whether the approved amendments to the state's Plan for Medical Assistance could be applied retroactively. Before the determination of this question in the district court, the Secretary on October 4, 1976 approved the third regulation, 10 N.Y.C.R.R.

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§ 86.26. By an order entered November 9, 1976 Judge Lasker held that the amendments could not be applied retroactively from the date of their approval to January 1, 1976 and directed the defendants to comply with his order of August 2. The defendants then appealed from this order.

On December 31, 1975, Congress enacted P.L. 94-182, § 111, 89 Stat. 1054, codified at 42 U.S.C. §§ 1396a(g) and 1396b(l). This law which was to become effective on January 1, 1976 gave states receiving federal Medicaid funds the option of either including in the state plan a waiver of Eleventh Amendment immunity with respect to suits brought by providers of in-hospital services or facing a 10% reduction in their federal payments. In response to this law, New York State executed a waiver of its Eleventh Amendment immunity on March 30, 1976. Thus at the time of the initial district court judgment in August the state's immunity had been waived.

On October 18, 1976 Congress passed P.L. 94-552, 90 Stat. 2540, which repealed P.L. 94-182, § 111, 89 Stat. 1054, the Act pursuant to which New York waived its immunity. The repealer was made explicitly retroactive to January 1, 1976, the day the repealed statute went into effect. On October 28, 1976 HEW issued to states which had executed waivers a directive to withdraw them effective January 1, 1976. New York State withdrew its waiver which was approved by HEW on December 8, 1976. Although the repealer was passed prior to the district court's ruling on retroactivity in November 1976, the trial court did not have an opportunity to determine the effect, if any, of the repealer on this action. There was a hearing scheduled after the November order to consider this question. However, the district court considered that it was without jurisdiction since a notice of appeal had been filed.

In addition to the novel legal question presented by the repealer itself, a further constitutional issue not briefed by the parties to this appeal is implicit. If the repealer and the withdrawal of the state waiver are found to revivify the state's Eleventh Amendment immunity, are the plaintiffs deprived of property (the August money judgment) without due process in violation of the Fifth Amendment? We express no opinion on either question. We are faced here with the unique situation where the constitutional issues set forth which may be fully determinative of the appeal have never been presented to or decided by the district court and not fully developed in this court. Under these circumstances we believe that the appellate process is best served by remanding these issues for determination in the first instance by the district court.

A We, frankly, do not know. What we were attempting to do would be to look at a group of hospitals that were comparable as to size, type and were in the same geographic area, and so forth, and not really initially raise the questions, but certainly the questions were in the backs of our minds, as to the reasons for the extent of variance among the hospitals in the group but, on the surface, based on the criteria we were using, looked to be comparable.

The efficient hospital, I think you mentioned the other day, could be at 110 percent or 0 percent of the group average, frankly.

Q The fact is that your groups are not really very homogeneous. Hospitals are grouped on a very gross basis; isn't that so?

A Yes. Using four criteria that would tend to put them in the proper group, from certain economic considerations--size is one, for example -- and the groupings would tend to classify them somewhat the same when you classify the teaching hospitals together versus the nonteaching, because you would anticipate that the teaching hospital would have a different type of patient because of the services.

Q That isn't necessarily true.

A It's not necessarily true, but we certainly would hope it would be true, that the teaching hospitals would be handling such cases as the open-heart surgery cases, more serious cases, which would obviously cost more.

Q If you had eight inefficient hospitals in the group, your group average would be nothing more than a mathematical average of the cost of eight inefficient hospitals, and the average would not measure efficiency at all.

A It would not.

Q If you had eight hospitals that were efficient and four inefficient and you averaged their routine cost, that would not give you a measure of efficiency either, would it?

A No, it would not. The comparison standing alone is not a measure of efficiency.

Q Is that basically the reason why you provided the appeal mechanism from rates imposed by ceilings because you recognized that there would be these unjustifiable results?

A I think that is true with respect to that specific section of Part 86 which relates to these ceilings, yes.

Q That was added to Part 86, subdivision (a) (7), I think it is.

A Yes, it was.

Q And it was added because you were lowering the ceiling to 100 percent on routine, you were imposing ancillary ceilings, and you recognized that the existence of just an average ceiling could impose improper economic results on the hospital, and therefore you were putting in a procedure which you felt was designed to give a hospital some relief by way of an appeal?

A Yes. That was specifically added becuase our appeals procedures prior to that -- and I believe what was included in Part 86 related to appeals -- did not specifically provide for that type of relief.

Q Would you agree with me that if you did not have that appeal provision, that the impact of the 100-percent average ceiling would be unfair and unjustified as far as many hospitals were concerned?

A Mr. Imberman, I would agree with you that if we restrict my answer to the groupings in 1976 --

Q That is all I am talking about.

Do the regulations of the Department of Hospitals require that hospitals file with the Department specific data showing patient mix by diagnostic description or surgical procedure description or any other technical descriptions?

Q The appeal procedure is an integral part of the 1976 formula, isn't it?

A To what extent?

Q Well, for the first time, in 1976 you had a ceiling fixed at an average.

A Yes, certainly.

Q Because of that, half of the hospitals were automatically disallowed?

A Certainly.

Q So the correct operation of your appeal process is central to a fair operation of the formula, isn't that so?

A Yes, I wouldn't argue with that at all.

Q I would like to get back to this Coler and Goldwater. Would you classify them as specialty hospitals because of the kind of patient mix they have?

A Usually we say that a specialty hospital is one we just can't group and we have several of those and -- well, another one that comes to mind is Sloan-Kettering.

Q You did group Coler and Goldwater?

A Yes, but I don't believe they are grouped for '77.

Q They are not?

A That is my understanding.

Q They become specialty hospitals not grouped?

A No, but as I indicated earlier, I do remember discussions about ceilings and I can't recall exactly what was discussed there, no. But if Mr. Davidoff says it was, I am perfectly willing to admit it was.

Q Are you telling me you can't recall, despite his testimony, whether or not you did make the decision?

A That's right.

Q Or why you made the decision, if you did?

A That's right.

MR. IMBERMAN: Off the record.

(Discussion off the record.)

Q Dr. Whalen, some short time ago I asked you a question about the importance of appeals in connection with the change in the ceilings to the average of the group, and you agreed that an appeal was an integral part and an important part of this system.

A Yes, I did.

Q Would you also agree that getting a prompt report on the appeal was also an integral and important part of this system?

A Yes, I would.

Q That is why you put out that memorandum, isn't that so?

A That's right.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., ET AL, :
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Plaintiffs
:
vs. : 76 Civil 2027 (MEL)
:
PHILIP TOIA, as Commissioner of Social Services of the State of New York, et al, :
:
Defendants

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Before:

Hon. Morris E. Lasker,
District Judge

New York, N. Y.
April 21, 1977 - 9.30 a.m.

APPEARANCES:

PROSKAUER ROSE GOETZ & MENDELSOHN, ESQS.,
Attorneys for Plaintiffs other than New York City Health and Hospital Corporation.
By: JACOB IMBERMAN, ESQ. and
STEVEN S. MILLER, ESQ., of Counsel

ROSENMAN COLIN FREUND LEWIS & COHEN, ESQS.,
Attorneys for Plaintiff New York City Health and Hospital Corporation.
By: PETER F. NADEL, ESQ. and
NADIA COLIN ADLER, ESQ., of Counsel

whatever HEW asks?

MR. C. MILLER: The state is in the process of meeting the HEW conditions. That has a bearing on this case in two respects.

First, as to the period from August 16, 1976 until March 31, 1977, certain of the portions of the methodology challenged by the plaintiffs were in effect, and those are no longer in effect as of April 1st.

As you know, we've asserted the position, and believe it is fairly clear, that for the August 16th to March 31st period the repealer legislation at this time precludes any retroactive relief.

THE COURT: Yes.

MR. C. MILLER: So that as to those changes that have been made, there really is no issue left for this Court to decide.

THE COURT: What changes? Are you talking about the material that was changed effective April 1st?

MR. C. MILLER: Yes.

THE COURT: Well, --

MR. C. MILLER: The reason I mention this is because -- I don't want to characterize the plaintiffs' case -- one of the main challenges has been to the ceilings aspect.

THE COURT: Right.

MR. C. MILLER: And one important aspect of the challenge has been the groupings. Your Honor has dealt with the groupings at some length in connection with the motions on your HAC.

Now, the groupings regulation has been totally rewritten, and that is a major change in the regulations. I won't try to characterize them, but I will simply say that to some extent at least we thing the changes go to meet at least some of the objections that the plaintiffs have made.

Another area of objections set forth in the complaint is the absence of procedures in the regulations for the hospitals to question determinations of over-payments. That's been changed effective April 1, and there are a whole set of procedures for that type of challenge built into the regulations.

The other major challenge to the '76 regulations was to the resident and interne provisions.

THE COURT: The salary question, yes.

MR. C. MILLER: That was changed by the April 1st change. The changes were not approved by HEW, and one of the conditions of approval which the state will meet is that we return to the resident and interne provision that has been in the regulation.

But the significance of this is that the issue of this particular provision has been given quite thorough consideration once again both by the state and by HEW in the approval process.

So that to the extent the process issues are at stake, the process in 1976 is now not by any means the whole or even the main record.

In order now to test the validity of the process of adopting the residents and interne provision, I think one would need to consider not only the 1976 record but also the 1977 record, where the issue once again considered by HEW.

THE COURT: That might be true if ultimately the courts rule in your favor on the effect of the Eleventh Amendment repealer. But just so we understand each other, if the courts were to hold that in spite of the repealer statute the waiver was good, the state's waiver was good for that period, then we would still be faced with the '76 question, would we not?

MR. C. MILLER: That's correct, if the court so ruled.

THE COURT: I'm not suggesting a ruling.

MR. IMBERMAN: Wouldn't the issue be what they did and the rec ord before them in '76 and not what they might have done a year later?

THE COURT: Well, it certainly would be, if you were entitled to any money back, if they had done something wrong. If as a result of the repealer statute the courts were to rule that you just couldn't get a money judgment, then it seems to me that Mr. Miller's position might make some sense, that you look at the processes up to date and see what happened. I'm not ruling that way.

MR. IMBERMAN: In any event, the changes that have been made have a significant bearing on the case.

THE COURT: Yes, I can see that, that they might anyway. But I didn't understand what your reference was to the ceiling situation.

MR. MILLER: As to the ceilings, the regulations retain the concept of ceilings.

THE COURT: Yes. But at what level?

MR. C. MILLER: The hundred per cent ceilings. The level of the ceilings aren't changed. The groupings of the hospitals has been totally rewritten.

THE COURT: Okay. Now, do you want to go on?

MR. C. MILLER: Yes. So it seems to me -- the first point was that the 1976 regulations by themselves, to the extent changed, are relevant only if there is a right to retroactive relief, as you said.

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To determine whether that is going to be part of this case or not seems to me --

THE COURT: It obviously points up the necessity of deciding that as rapidly as possible. All the papers are in now, are they not?

MR. C. MILLER: All the papers are in, yes.

On the question of future relief, to the extent that there are challenges to ceilings and to the other changes that have been made in the 1977 regulations, if plaintiffs want to challenge them, and I don't know if they do yet, it seems to me that the record we have made so far is nto complete and you have to try that issue, because if the challenge is to the proces of the regulations for adoption of the regulations now in effect, that process is one that took place in 1977.

THE COURT: I suppose a comment from plaintiffs' counsel as to how they feel a change in the regulations affects what they intend to do about it. I don't know if you have had a chance to study them.

MR. IMBERMAN: Your Honor, all I can say is that it was my understanding that there were certain changes made in 1977 and that by far the largest part of Part 86, which was in effect in 1976, remain in effect in 1976.

THE COURT: In '77.

MR. IMBERMAN: Some of the most important aspects of the things were challenged here, such as the ceilings of the group average, the internes and residents' disallowance of costs, the change in Section 86.21(k), and some other things have been changed.

I can't speak at this moment, and I don't think I am authorized to speak for my client, as to what the hospitals intend to do. As Mr. Miller has said, whatever regulations they have promulgated now have to be changed to meet certain conditions which HEW said it will insist on.

Until we see the regulation in final form, until my client makes a determination, I don't see how I can say anything. But I don't think that whatever changes the state made in 1977 should affect ordelay this case.

MR. C. MILLER: Your Honor, one point that I was suggesting for my comments was that it is important to have the jurisdictional question decided because --

THE COURT: I don't see that anybody can differ on that.

MR. C. MILLER: On the question of the trial going forward on May 2, we have, like Mr. Imberman, been puzzled as to how the case could be divided so that a meaningful piece of it could be tried on --

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., et al., :

: Plaintiffs,

:

- against - : 76 Civil 2027 (MEL)

:

PHILIP TOIA, as Commissioner of Social Services of the State of New York, et al., :

: Defendants.

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B e f o r e:

HONORABLE MORRIS E. LASKER, District Judge.

U. S. Courthouse
New York, N. Y.
May 5, 1977 - 10:50 A.M.

APPEARANCES:

PROSKAUER, ROSE, GOETZ & MENDELSOHN, ESQS.
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N. Y. Health & Hospitals Corp.,
BY: JACOB IMBERMAN, ESQ.,
STEVEN MILLER, ESQ.,
M. WILLIAM SCHERER, ESQ.,
of Counsel.

ROSENMAN, COLIN, FREUD, LEWIS & COHEN, ESQS.
Attorneys for Plaintiff Health & Hospital Corp.,
BY: PETER F. NADEL, ESQ.,
NADIA C. ADLER, ESQ.,
of Counsel.

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THE COURT: Good morning.

I call on Mr. Charles Miller in connection with the motion to dismiss brought under the 11th Amendment.

MR. C. MILLER: Thank you, your Honor.

I have assumed that either you had completed or would certainly complete the briefs, which are I think quite full in their argument of all the issues. So what I thought I could best do this morning is perhaps just touch on two or three points that I think might be benefitted by a little more elaboration. I suggest that approach to the analysis of the questions.

We would respectfully suggest that the analysis of the case breaks down to three points: first, the statutory question. Does the statute withdraw the jurisdiction of the court to enter the order that was entered?

Secondly, was there a waiver of the State's 11th Amendment right? That is a judicial waiver. The plaintiffs have referred to it.

And, thirdly, is there a constitutional impediment to the application of the statute if it does apply and if there wasn't a waiver?

I will not repeat all the arguments in our briefs, but I will just make a few points.

On the statutory question it seems to us that one reads the statute that was enacted in December, 1975, and it did two things: First, it required that the States waive their 11th Amendment immunity to suits by hospitals concerning in-patient rates.

Secondly, it imposed a so-called 10% penalty on States that did not execute that waiver. It made both of those provisions effective January 1, 1976.

The repeal legislation in October 1976, by its term, repealed both of those provisions and made the repeal of both effective January 1, 1976, the date that they had originally been made effective.

So that the words of the statute conform to what we argued to you was that the intent of Congress, namely to undue totally what it had done in December 1975 when it adopted the, what we have called, the forced waiver.

THE COURT: Mr. Imberman may argue to the contrary. At the moment I don't think that there is any question that Congress meant to undo what it had done. There are two questions in my mind, and the first is whether in the affairs of man you can ever undo what has been done. The situation is different after something has been passed and repealed than it was as if it had never been passed and repealed.

The second is that of course the one we are coming to which is even if they had the right to repeal, do they have the right to repeal in a way which might take away rights that accrued in the interim?

MR. C. MILLER: Let me take them in the order that you raised them: In the first of the questions, can the Congress undo what has been done in the interim --

THE COURT: I do not mean in the sense of legal power.

MR. C. MILLER: It seems to us from the reading of the legislative history, which is attached to one of our briefs --

THE COURT: I have not studied that.

MR. C. MILLER: Look at the Congressional Report. It is only four or five pages. We thought it would help your Honor to appreciate what the Congress had done.

THE COURT: It will help us as much as legislative history can help.

MR. C. MILLER: What you get from that is that Congress intended -- this was not a technical procedural action by the Congress but rather an action that was intended to undo a policy action that had been taken the year before because of the feeling that a mistake was made. The Congress had acted in haste without consideration of the implications of what it was doing, and its repeal was in response to an immediate and substantial outcry from all the affected interests or the adversely affected interests. This was a gray area in Federal/State relations, Medicaid and Social Welfare Administrations.

It was not as the plaintiffs have argued, that is it, the repealer, was not simply a decision to eliminate the penalty -- the second of the two provisions of the original statute.

It is true that the Congress wished to eliminate the 10% penalty, but the legislative history goes far beyond that. I think it demonstrates that the intention was to wipe the slate clean and to remove the adverse effect to the States that the original statute had created.

THE COURT: Assuming that is so -- as I say, I have not looked at the legislative history, but I have had discussions with Ms. Jackson leading me to believe that Congress did not specifically address the question that I am concerned with, that is the existence of pending litigation.

MR. MILLER: I think that is right. I don't think there was any specific reference to pending cases, acknowledgment.

I think that cases either had been or would

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be brought under the old forced-waiver provision.

THE COURT: I think Mr. Imberman expresses the future tense. I do not think that necessarily means that.

MR. C. MILLER: Yes, your Honor, that is right.

If the statute had explicitly said one way or the other, this is how we decide the statute, we wouldn't be here.

We have advanced in our briefs and relied upon a line of Supreme Court decisions, the most recent one being the De La Roma cases, the line of cases which established the principle that where there is the removal of jurisdiction of courts to decide, Federal courts to decide cases that absolute and explicit direction to the contrary -- those removals apply to pending cases. I would simply, without trying to restate them all, just respectfully invite your Honor's attention to that discussion in the briefs.

THE COURT: I do not think Mr. Imberman challenges the holding of De La Roma. But there are two differences between this case and the De La Roma case, it seems to me, which leaves the question: First, although certainly respectable argument can be made to your position, that the fact of the repealer could deprive the Court of jurisdiction, it is the fact nevertheless -- and we have to consider what it means -- that neither the original statute nor the second statute talks in terms of jurisdiction. They talk in terms of the 11th Amendment. Of course that may open the door.

The second is the fact that there has been a judgment in this case, although it is a fact that the judgment is pending appeal.

MR. C. MILLER: On the first of the two questions, we have acknowledged that the 11th Amendment is not purely jurisdictional in this sense. Section 1331 would be purely jurisdictional.

In the Edelman case it was stated that the 11th Amendment partakes of the nature of the jurisdiction. We thought that the De La Roma line of cases was at least the closest of the cases to afford the Court a basis for construing the statute where the Court has not explicitly spoken to the question before us. In the end, your Honor, I said more about this than I was going to, but I am happy to respond to the concerns that you have raised.

In the end it seems to us that the position the plaintiffs have argued is that there be two laws in the country on this point, one for New York and one for the rest of the country.

New York being in the position that it would be in under that theory only because it was more compliant with the Federal requirements than many other States.

THE COURT: Wasn't it the only State that signed a waiver, or the only State that signed a waiver and got sued?

MR. C. MILLER: And has had a suit progressed as far as this case.

THE COURT: There is another case pending in Colorado, I know, which originated about the time of this one because Feinsilver out there has been in touch with me about it. I saw him recently and he said it was still going on.

MR. IMBERMAN: I was not aware of it, your Honor. I do not think anything has been published on it.

MR. MILLER: There have been a number of suits that were brought by hospitals challenging various practices. The point I make is that Mr. Imberman argued, and I think probably we don't know that there are any different situations, that this is the only case that is in this particular situation.

It seems to me that it is ironic that the result of the statute where the Congress had a fairly wellspelled-out intention to impose on New York, which is hardly in the best position to absorb this sort of result.

THE COURT: I don't suppose many states are in very good shape on this. Now it has risen to the Federal level.

Mr. Miller, I see some logic in your argument about the uniqueness of the New York situation, but would it not be true that if the judgment had actually been affirmed on appeal for example, and Congress repealed the statute a little later and the money had been paid, New York would be in a unique position. There is nothing anybody could do about it.

MR. MILLER: I think that is right.

THE COURT: Things do happen likethat in law. In other words, for a certain period of time the legal posture is such that somebody happens to be involved in it and then it is changed and he is the only one that is involved in it.

I do not know that that particular point really get there so far. I would like to ask this:

You have not -- you have referred to the due process question, I guess, to the extent that you have referred to such cases, the De La Roma case, et cetera. Are you coming to that?

MR. C. MILLER: Yes. If you don't mind, your Honor, I would like to say a word about the waiver point first because I think it logically comes first. This is the so-called judicial waiver which is based on a statement attributed and made by an Assistant Attorney General Fein.

The chambers conference of July 28.

THE COURT: At this stage Mr. Imberman and maybe you will want to argue the point strongly, therefore, I am not really impressed with the waiver proposition. I want to study again what was said by Mr. Fein and myself and so on. But it seems to me an awful lot of strength is being placed on that fragile statement of Mr. Fein's. I haven't investigated the New York State law, but if the law is -- and the Second Circuit decisions are as heavy as they appear to be, I have serious questions that Mr. Fein had authority to waive. In any event, if you want to add something to that, you are free to do so.

MR. MILLER: Your Honor, I do not relish the idea of going through transcripts that would have been anticlimactic after last night, anyway.

THE COURT: I was there, Mr. Miller, you were not.

MR. C. MILLER: I recognize that. That gives me the benefit of objectivity only. But from reading two sentences, I won't go into the details of it. It seems clear to me that from the time the case was filed in July, when your Honor entered his first decision that Mr. Fein on behalf of the State defendants was most vigorously arguing a jurisdictional defense, not the one we are arguing now, the defense that it was unconstitutional to force the State to waive.

I have selected some passages from the transcript and I won't go through them, but your Honor discussed those points.

In your July 29th decision there were four or five pages in your oral opinion where you went through the argument of Mr. Fein with some care and agreed with him that the State -- it appeared that the State had been forced to waive and then concluded contrary to his argument that although forced, it nevertheless was a waiver in the circumstances.

In all that discussion there isn't the slightest suggestion that you felt that the day before that, Mr. Fein on behalf of the State had waived any jurisdictional points.

In fact, the statement made on which the plaintiffs rely is one in which you ask Mr. Fein, "If I find against you, but don't enter an injunction, would the

State assert the 11th Amendment immunity later?"

The answer was, "I think I can say no."

We read that and s wasn't there, but it seemed to me quite clear what that meant: Is my statement of the law sufficient for the State to comply?

THE COURT: Without having refreshed my recollection, I must say that I think that was the frame of mind I was in.

MR. C. MILLER: Let me go to the constitutional question, your Honor. I will say to you that as we have analyzed the case, we think the constitutional question is a question that is significant. I wouldn't pretend to argue to your Honor --

THE COURT: The Court of Appeals thought it might be significant, too, apparently.

MR. C. MILLER: As we have read the briefs that have been filed on both sides, two things appear. One is that the general principle that seems to be important, strictly those I think we have cited to your Honor, that parties generally do not have vested interests in judgments until they become final. That has normally been applied to cases where Federal Court jurisdiction has been removed by Congress while cases are pending.

We have cited the ex-parte McCardle case, the most famous of a long line of cases that stand for that general proposition. The plaintiffs in their brief cited the case of McCulla vs. Virginia, which is unquestionably the major argument in their support and the major hurdle for us.

We gave this case considerable attention in our reply brief and that's the second document, your Honor, that I would invite you study with care, and I know you will. That case seemed to say that once the trial court had entered a judgment, at least that state court judgment in that case, that there is some constitutional bar --

THE COURT: Excuse me. I have a jury out.

MR. C. MILLER: In the McCulla case there seemed to be a statement that once the trial court judgment had been entered that there was some constitutional protection for it against the subsequent removal of the court's jurisdiction.

THE COURT: Excuse me. We will take a brief recess.

(Recess.)

MR. C. MILLER: We think the McCulla case, first of all, has to be understood in its historical perspective. As I pointed out in our brief, that case is just about the last in a long line of cases in the Supreme Court that arose out of the post-Civil War debt repudiation movement that moved a number of States. I think without giving you an extended argument, one reads the case and comes away particularly as informed by the discussion, for example, in Warren's book, to be cited in our brief, that the court treated this as another effort by the State of Virginia to eradicate the rights of the coupon bondholders involved.

I think that is the best explanation for the case. I would like to say in addition to that, your Honor, that not only has the McCulla approach that plaintiffs rely upon, namely, that once you get a trial court judgment you have a constitutional protected interest that cannot be disturbed by later action -- that has not been followed in cases involving Federal Court jurisdiction. We have cited those cases.

Particularly, we have cited the two lines of cases that are much more recent and seem to be much more apropos, the portal-to-portal cases, not only the Battaglia case in the Second Circuit but another line of cases in the same vein which are cited in our reply brief, including some cases in this District Court and a Supreme Court case.

Secondly, the Veterans Administration cases, which expressly recognize McCulla, still held that as far as Federal Court jurisdiction is concerned a money judgment secured from a trial court is not immune from subsequent removal of jurisdiction as long as the case is still pending on appeal.

THE COURT: He can see either principle, but I cannot see why one should apply in the State and one in the Federal system.

MR. MILLER: There are some arguments that one could make that the Congress under its enumerated powers has perhaps greater powers to regulate than the State, that has a narrower scope. We don't rely on that anyway.

THE COURT: You could argue to the contrary that the States are sovereign and Congress is not.

MR. C. MILLER: It seems to me that the McCulla case is explained as a case where the Court viewed the action of Virginia, the action that would have removed the jurisdiction of the Court as another in a long line of efforts to eradicate the rate.

There is a line of cases, both Federal and State, that say if the real effort is not simply to restrict the remedies but eradicate the rate, that you cannot do.

THE COURT: Excuse me. Putting aside for the moment the question of whether this judgment is sufficiently ripe to have created a vested interest, so to speak, and talking about remedies, are there any other remedies that you believe that the plaintiffs have here if your argument prevails?

MR. C. MILLER: I would like to answer that two ways:

I think, first of all, plaintiffs have said they have other remedies and have already invoked the State Court of Claims Remedies and said in their briefs that they will pursue other remedies. Our view of the matter is, and we have said this, that the plaintiffs have whatever remedies they had on December 17, 1975 and even before.

The additional remedy of the Federal Court jurisdiction was given.

We don't mean to concede and don't concede that the State would be liable for these payments in another action in the State. We will defend that when the time comes. The plaintiffs have their remedies, they have intended to pursue them, and they have whatever remedies they had before Congress on Decmeber 18.

THE COURT: Excuse me, I'm afraid I will have to go to the jury for a few minutes.

MR. C. MILLER: May I make one more point before you yield, your Honor? You have touched on it yourself a while ago, everything else has been argued up to this point. We think that there is also a point -- and in fact in this case -- the order on which the constitutional claim is predicated is simply not of sufficient strength and finality to warrant a constitutional --

THE COURT: You are talking about the question of expectation?

MR. C. MILLER: Yes. We have argued in our brief the point of expectations.

THE COURT: You could perhaps say that they had no right to expect me to grant them the order in the first place.

MR. C. MILLER: Well, in fact you entered the order on August 2nd. On August 16th, HEW approved, and on that date or the next date the Court of Appeals remanded matter back to your Honor.

On August 25th the parties entered into a stipulation which I think was in lieu of the Court of Appeals' order itself, signed by all parties at that time.

The stipulation basically says that this Court may now decide the question of whether the reimbursement for the January 1 to August 16 period is to be calculated in accordance with the plan as it existed, at the start of that period, or the plan that was approved on August 16 -- the retroactive question, in other words.

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You decided that issue on November 9, but by that time the jurisdictional statute had been passed.

The point I want to make, in light of the Court of Appeals' action and this stipulation, is that the plaintiff did not have anything on August 17 and thereafter that they could take anywhere and enforce. They did not have the kind of judgment, vested right that could be acted upon that gave them anything but the right to go before your Honor and argue one more point that had to be decided before they could do anything.

Before your Honor made that decision, the statute came down. It is true that the statute had not been invited for your Honor's attention or noticed by the Court sua sponte, prior to your action of November 9.

It does not seem to us, however, that the fact that you were unaware of it increases plaintiffs' constitutional rights.

THE COURT: I wouldn't think so.

MR. C. MILLER: As of the time the matter was enacted, when the matter before you in our view was still essentially open, the plaintiff did not have the kind of vested judgment that was, for example, possessed by the plaintiff in the McCulla case, which would be the predicate of a claim of constitutional right. We have cited some cases in our reply brief. The Fleming case in the Supreme Court dealt with a situation like this. There just wasn't the kind of right that rises to a constitutional dimension. Basically, your Honor, Ith ink you grasped our position. We have argued based on the Rothstein case in the Court of Appeals as a separate basis, and I will not argue that at this point.

MR. IMBERMAN: Let me start by answering this last point while it is fresh in my mind.

I think there is a basic invalidity to what Mr. Miller has said because on the remand, your August 2nd judgment was still in effect. All that happened was that the Court of Appeals said "We would like the District Court to consider the issue of retroactivity which had not arisen the moment before the August 2nd judgment was entered.

It is true that your Honor's decision on retroactivity in the plaintiffs' favor came down a few days after the repealer had become law. But, bear in mind that the State did not withdraw its waiver until December, after your determination came down.

The waiver was still there. It was still in effect and your Honor therefore had the right, and it seems to me that that simple fact disposes of the argument which Mr. Miller has just made.

As far as the balance of the argument is concerned, I am going to be very brief because I take into consideration that we have a long agenda, and your Honor has given us just the morning. I am sure that your Honor has other things to do this afternoon. Somebody somewhere along the line has to eat lunch.

THE COURT: I would like to leave by twelve-thirty.

MR. IMBERMAN: I will say very briefly that we start here with certain basic propositions. One of the propositions is that your Honor has decided that the amendments proposed for the State plan were not valid until approved by HEW, and your Honor has decided a retroactivity issue.

Neither one of these is in issue here any longer, and as far as we are concerned, the defendant even in the Court of Appeals gave up on arguing those points because they were never even briefed to the Court of Appeals.

So the issues are as I see it, whether the repealer deprived the Court of jurisdiction, which I think is basically because if you decide that case, that issue in favor of the plaintiffs, then you don't have to get to any other issue because the Court of Appeals' remand specifically says, as I read it, that if the repealer and the withdrawal of the State waiver are found to revivify the State's 11th Amendment immunity, are the plaintiffs deprived of property, the August money judgment, without due process, in violation of the Fifth Amendment?

It seems to me, if your Honor finds that the repealer did not, as far as this case is concerned, revive the State's 11th Amendment, that's the end of it.

THE COURT: Are you suggesting that there ought to be an easier way for me to handle it?

MR. IMBERMAN: I am saying that that's exactly what the Court of Appeals said. If your Honor doesn't come down on our side at that point, then we have to consider whether the repealer and the withdrawal, the subsequent withdrawal deprived us of due process.

I think one other issue that has to be considered by your Honor, as far as that is concerned, is the issue which we have raised in our brief, and that is the estoppel, to which Mr. Miller did not refer.

We believe that the estoppel argument in this case is very strong against the State. What I would like to talk about for a minute is the question of whether or not the basic legislation which became effective on January 1, 1976 was --

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THE COURT: Excuse me. You mean the original legislation?

MR. IMBERMAN: Yes, -- was granted granted jurisdiction.

It seems to me when you read the statute there is no --

THE COURT: I made that point. I agree with you on that score to the extent that it settles the question.

Unfortunately, it is not altogether settled because of Edelman's description of the 11th Amendment -- jurisdictional or whatever phrase he used, tending towards jurisdiction of the nature of the jurisdiction, I guess.

MR. IMBERMAN: That is exactly correct. It says it partakes of the nature but is not jurisdictional, because if it was jurisdictional you would not have had in Edelman --

THE COURT: Excuse me. You couldn't have the waiver, as you pointed out in your brief. I thought that was a good point.

MR. IMBERMAN: I think one of the easiest ways of looking at this question and determining how it ought to come out is if you looked at the issue as if the original legislation had not been enacted, the State of New York had filed a waiver of immunity, had consented to be sued, and this controversy came along. We started a lawsuit in this court because the State consented to be sued here.

Your Honor's August 2nd judgment came down and then the State decided, "Well, we don't like this. We are now going to withdraw our waiver of immunity."

Would that oust your Honor from jurisdiction after a judgment had been entered, merely because the State decided --

THE COURT: I do not know.

MR. IMBERMAN: -- that it now changes its mind?

THE COURT: To help get the thing in focus, but I am not sure that I wouldn't be left with the same legal question. It would depend on the posture of the case at the time.

MR. IMBERMAN: It seems to me that it is quite clear that where a lawsuit has been started, in reliance upon the State's statement that we consent to be sued and where everything has happened which has happened, the mere fact that the repeal legislation was enacted -- so in effect you are back to square one where you were on December 31, 1975, it does not affect the rights which the plaintiffs have, and it clearly does not affect this Court's jurisdiction.

THE COURT: Let's assume those things a moment. Supposing all those things, if I assume everything that you have asked me to assume, and the third day out after you filed your complaint in this case the State had withdrawn its waiver, would you have a right, and if not, at what point do you judge when the rights accrue?

MR. IMBERMAN: I am glad I don't have to decide that, your Honor. All I can do is say that certainly at the point where we have a judgment, at that point the State cannot change its mind and say, "Now we are going to withdraw our waiver because we don't like how this thing is coming out," which is in effect what was said.

There are a number of other things.

THE COURT: Excuse me. Actually the legislation ordered the State or HEW ordered them to do that. I do not know what the legal significance of that is.

MR. IMBERMAN: You mean the order to withdraw?

THE COURT: No.

MR. IMBERMAN: It is not an order. I know that Mr. Miller has characterized it as such in his brief, but -- and regardless of what language HEW may have used -- unfortunately we have -- they are pretty loose in the use of their language with respect to their directions to the States.

The fact of the matter is, I do not think their position is to whether, as the result of the repealer, they could order them or direct them.

THE COURT: There is nothing in the legislation that indicates that, and I can't believe that the States are going to say that, "We will continue to waive if we want to."

MR. IMBERMAN: I do not think that is an issue. The fact of the matter is, as far as the Congressional history of the repealer is concerned, I also urge your Honor to read the legislative history, because I think what comes through there is that the various States were quite concerned about the loss of revenue, the penalties that might come to them if they did not file the waivers immediately, because the penalty became effective within the first quarter.

Many States had difficulty in having that brought about because many of them had to call sessions of the State Legislature into effect in order to accomplish the filing of the waiver.

Many of them for many practical and political reasons could not do that. Here they were faced with this large loss of money. That was what triggered the pressure on Congress and the prompt repeal of the statute more than

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anything else. When they talked about legislation they talked about it in the future, litigation they talked about in the future.

THE COURT: Yes.

MR. IMBERMAN: I would like briefly to talk about the second issue which is posed by the Court of Appeals, which I call step two. If we lose on step one, then you have to decide step two.

I think we have McCulla, which is a case squarely in our favor, and despite everything that Mr. Miller said, he cannot point to any case where the Supreme Court has overruled McCulla or said McCulla is not good law any more.

He cited some Court of Appeals cases or District Court cases that come to some different conclusion.

THE COURT: Do you think it is reconcilable with the case he does cite, or is consistent?

MR. IMBERMAN: I think Imberman is the Supreme Court's word on the issue that is as close to it as possible.

I do not think there is a Supreme Court case which directly overrules that case, that McCulla is no longer good law.

If you take McCulla, I think, which was

affirmed in a later case which we cited in our brief -- some thirty or forty years later, and has never been overruled. I think you are faced with a proposition that either Mr. Miller misreads the meaning of the repealer statute or it is just unconstitutional, if it is going to be interpreted that way.

I would like just for a minute to talk about the estoppel.

THE COURT: I would like to hear you on that.

MR. IMBERMAN: All right.

We have briefed the point, and I think what you have here is a case that is very close to an Appellate Division case which came down about a year ago.

THE COURT: Incidentally, do you think this is a question of State law?

MR. IMBERMAN: It is State law, but it is so analogous to what happened here in the Eden case, which we cited, the State of New York had publicly announced that it was going to open a college of pediatrics, or something like that, as part of the State University.

It sent out invitations to a large number of people inviting them to enroll in the school. It was going to be a small school and 24 people enrolled, giving up an opportunity to go to other schools.

Then at the last minute the Director of the Budget evidently informed the State University people that they could not open this new college because of fiscal pressures on the State. The State decided that it therefore would not open the school, the college, and they notified all the young people that they are very sorry, "but we are not going to have a college." The students could not go anywhere else.

They brought a lawsuit and the Appellate Division pointed out that the invitation to people to enroll, their acceptance, their coming to the school saying, "Fine, we will go," and the dilemma that they were put in because their careers were brought to a halt was such that there was a manifest injustice. The State was estopped from asserting that it was no longer going to open up a college, and in fact the Appellate Division pointed out that the fiscal argument that was made that there was no money was false because the State was already committed to the very faculty members who had been hired -- they entered contracts and whatever else had happened.

So there was no real budgetary consideration. It was manifestly unjust to these people.

I say, your Honor, that that is almost precisely parallel to our situation. The representations by the State defendants, they filed a waiver, and you can rely on that -- it clearly misled us. We went ahead and started the lawsuit.

The underlying basis for the defendants' attempt --

THE COURT: It did not mislead you into starting a lawsuit?

MR. IMBERMAN: We furnished service.

THE COURT: That's what I thought you meant.

MR. IMBERMAN: The underlying basis here for the State defendants' attempt to withdraw the waiver in this case, it seems to me, is based on just a false budgetary consideration as the Appellate Division found in the Eden case, the college case, because at least at this moment in your Honor's court the money is due.

Your Honor has decided that. We are not here in a motion to reargue. Your Honor has decided that the money is due. So that at some time, and at some place, they are going to have to pay the money, I hope. For them to say, "We have withdrawn this because of some budgetary consideration" is not going to get them anywhere as far as this judgment is concerned, and this money for the period January 1 to August 16th.

The obvious injustice which will be suffered by the plaintiffs in this case is just as clear as it was in Eden.

THE COURT: What about the Court of Claims, can you get the money there?

MR. IMBERMAN: Your Honor has heard Mr. Miller. He has said that the State of New York does not concede one jot or tittle of our right and they will oppose us to collect this money wherever we go regardless of your Honor's judgment.

We are here exactly one year after this lawsuit was started.

THE COURT: Can't you get a judgment in the Court of Claims on the basis of res judicata or collateral estoppel?

MR. IMBERMAN: He will oppose me on everything I try to do. As a protective measure, we have filed a notice of claim in the Court of Appeals.

I think the public interest will be served if this money is paid, for obvious reasons.

THE COURT: I cannot assert jurisdiction if I don't have it, even if the public interest is served.

MR. IMBERMAN: I would like to say one other point, which I think is equal and as impressive as it was in Eden. I do not think we are ever again going to find a case where Congress says the States have to file a waiver, and then the statute is changed and the lawsuit is brought, and everything.

I end up merely by saying, your Honor, that ruling against us really deprives of of a remedy, aside from the jurisdiction aspect, and we take Mr. Miller at what he says. We have no remedy here.

I have nothing further to say at this time.

THE COURT: All right.

Mr. Nadel, I take it that you do not want to saying anything, seeing that you shook your head.

MR. brown NADEL: I want to say, your Honor, that we are not taking a position. If your Honor desires at some point that HEW give some assistance, we will be ready to give that assistance if your Honor desires.

THE COURT: Thank you for the offer.

Let's get down to the housekeeping questions. I have no agenda. Mr. Imberman thought that we had a long agenda, which leads me to believe that he has one. My purpose in calling you together was just so we could have some time to canvass what the pretrial proceedings from here on are likely to be, if not to establish a schedule, then at least to establish a time for establishing of the schedule, hopefully by consent, and also to determine how

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., et al., :

Plaintiffs, :

-against- : 76 Civ. 2027(MEL)

PHILIP TOIA, as Commissioner of Social Services of the State of New York, et al., :

Defendants. :

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July 21, 1977
2:10 p.m.

BEFORE:

HON. MORRIS E. LASKER,
District Judge

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(Appearances continued on next page.)

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would like to stress, even if for some reason your Honor were to find that the consideration by HEW of these amendments, the State amendments was inadequate, the question then becomes what is the relief, what should happen. Your Honor has addressed that.

We have suggested that the only appropriate relief would be a remand to the agency for it to reconsider the plan in light of your ruling.

THE COURT: What do you say about Mr. Imberman's statement about the ABA --

MR. C. MILLER: We have stated the Umana case --

MR. IMBERMAN: That is a Medicaid case.

MR. C. MILLER: I think there are countless cases which the Courts have remanded to the agencies without disturbing the agencies' action.

I also want to address the point made because we haven't had an oppottunity to do so so far, that the Court might grant a declaratory judgment, this was suggested in the papers and I mentioned it here again also. It is recognized, I am not operating on the assumption that the Court agrees with us that the repealer legislation cuts off the right at some point, cuts off the right to retroactive relief. If it does so I suggest that it would be inappropriate to enter a declaratory that would have any retroactive effect because that would be doing the same thing that the repealer legislation was designed to prevent.

Declaratory judgments normally are designed to resolve current disputes so that parties may adjust their conduct accordingly without the necessity of having to run the risk of actions prior to judicial determinations. That doesn't apply in this case because there is no future as far as the amendments before your Honor are concerned. They terminated in effect as of March 31st, 1977 because on April 1st, 1977 a new plan came effect. Now it is true that some of the provisions in the old plan were continued forward. The point is that on the basis of the summary judgment motion before you, which goes to the question of HEW consideration, that matter terminates as of April 1st, 1977 at which point we had a new plan and new Hew consideration and new approval.

So that there is no basis for, even if that were wrong, a declaratory relief. Even if there could be relief post-April 1st, it like injunctive relief could be prospective only. We have not briefed this point, your Honor, and it becomes a point of issue, if it does, we would like the opportunity to brief it. I suggest that it would wait in any event.

THE COURT: I think it is important to discuss these things.

MR. C. MILLER: I do not want to suggest that that should be the major point of concern for your Honor. We don't think this motion for summary judgment is well taken, we think it is based on a rigid reading of the cases. I will attempt to take concepts and principles applicable to some area and apply them to other areas without the difference. We have tried to spell this out in our briefs and subject to what I said today about how the motion has been developing, we respectfully request that your Honor refer to our briefs for any further assistance.

THE COURT: I shall.

MR. IMBERMAN: Your Honor, may I speak just a minute to the relief question. That's all. There are a number of things but I do not want to take up too much time.

THE COURT: I will have to leave.

MR. IMBERMAN: If your Honor should find in favor of the plaintiffs on the motion for summary judgment and declare that these particular amendments to which this

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., MISERICORDIA HOSPITAL MEDICAL CENTER, BUFFALO GENERAL HOSPITAL, THE GENESEE HOSPITAL, and THE MOUNT SINAI HOSPITAL on behalf of themselves and all other nonprofit hospitals which are members of the HOSPITAL ASSOCIATION OF NEW YORK STATE, INC. and which are reimbursed for Medicaid services rendered to hospital patients,

76 Civ. 2027

Plaintiffs,

-against-

MEMORANDUM

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, ROBERT P. WHALEN, as Commissioner of Health of the State of New York, PETER GOLDMARK, as Director of the Budget of the State of New York, HUGH L. CAREY, as Governor of the State of New York, and DAVID MATHEWS, as Secretary of the U.S. Department of Health, Education & Welfare,

Defendants.
---X

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LASKER, D.J.

On March 16, 1977 the Court of Appeals remanded for this court's consideration the question whether Congressional repeal of 42 U.S.C. §1396a(g) (a provision requiring states participating in the federal Medicaid program to waive their immunity to suit in federal courts with respect to certain claims made by hospital providers of services) as of its effective date subsequent to the entry of final judgment by this court against the State but before the appeal was decided affects the validity of that judgment, and if so whether the statute is constitutional. For reasons set forth below, it is concluded that both such questions must be answered in the affirmative and that therefore (1) the judgment of August 2nd, insofar as it grants monetary relief against the State of New York, must be vacated and (2) the State defendants' motion to dismiss plaintiffs' claims for monetary relief against the state must be granted.

I.

In 1966 Congress enacted Title XIX of the Social Security Act, 42 U.S.C. §1396 et seq., commonly known as the Medicaid program. Under this program, administered by the states pursuant to the statute and to regulations promulgated by the federal Department of Health, Education and Welfare (HEW), providers of medical services are reimbursed by local, state and federal governments for services rendered to eligible patients. The statutory provision of the Medicaid Act at issue in this suit is 42 U.S.C. §1396a(a)(13)(D) which requires that providers of inpatient hospital services be reimbursed by the states for the "reasonable cost" of providing such services, and that the "reasonable cost" must be determined in accordance with "methods and standards . . . approved by the Secretary [of HEW] and . . . included in the [official state Medicaid plan]."

Since 1970 New York State has utilized a prospective methodology of reimbursing hospitals for inpatient services. Based on predicted costs for the forthcoming year rather than a retrospective formula, the prospective reimbursement methodology is part of the State Medicaid plan. Ordinarily, at the end of each calendar year the State publishes the reimbursement rates for each group of hospitals for the forthcoming year, on the basis of the "methods and standards" contained in the existing state plan.

At the end of 1975, however, New York issued "interim" rates consisting essentially of a "freeze" at the 1975 rates. On May 5, 1976, plaintiffs -- a class consisting of all of the approximately 270 voluntary and public hospitals in New York State -- sued the Secretary of HEW and various other state officials. They claimed that the "freeze" was illegal in two important respects: (1) it amounted to an amendment of the State plan which had not been, as required by 42 U.S.C. §1396a(a)(13)(D) approved by the Secretary prior to implementation, and (2) the "freeze" deprived the hospitals of reimbursement for their "reasonable costs" of treating Medicaid patients to which the statute entitled them.

Two months after this suit commenced, the State promulgated a revised formula for determining the 1976 rates. The formula changed several important aspects of the reimbursement methodology: in particular, it lowered the ceiling on reimbursable costs for routine inpatient services from 110% to 100% of the average group costs, and for the first time imposed a ceiling (of 100% of average) on reimbursement for ancillary inpatient costs.[1] On July 16, 1976 plaintiffs amended their complaint and moved for a preliminary injunction against implementation of rates calculated according to the new formula. The amended complaint raised essentially the same objections to the revised methodology as had been raised in the original complaint against the freeze: namely, that the revised formula had not been approved by HEW and thus could not lawfully be implemented, and that reimbursement rates calculated according to the new formula would not reimburse plaintiffs their reasonable costs of providing services.

On July 20th and 28th, 1976 hearings were held on the motion for a preliminary injunction. At this time, the State argued that any grant of monetary relief against it was barred by the Eleventh Amendment. Plaintiffs argued, however, that New York's "consent to suit," executed on March 30, 1976 and incorporated in the State plan, removed any jurisdictional bar to such relief. Effective January 1, 1976, (42 U.S.C. §1396a(g)) Congress had required states participating in the Medicaid program to consent to suit in federal court by hospitals claiming that the state was not in compliance wit §1396a(d)(13); states which failed to comply with this waiver provision were penalized 10% of the total/federal Medicaid funds to which they would otherwise have been entitled, 42 U.S.C. §1396 b(1). Pursuant to the new law, but under protest, New York had executed a consent to suit.

Defendants responded to plaintiffs' argument by urging that the consent to suit was not voluntary, and had for all practical purposes been coerced by the new legislation, which imposed severe financial penalties on states which failed to waive their immunity. They urged that we find the waiver of immunity to be ineffective and the legislation requiring the waiver to be unconstitutional. After briefing and argument on this question, we held, on the authority of Employees of the Department of Public Health & Welfare of Missouri v. Missouri Public Health

Dept., 411 U.S. 279 (1973), that Congress could constitutionally require such a waiver and that the State's consent to suit was valid. We went on to find that §1396a(d)(13) required prior Secretarial approval of the changes made in the reimbursement methodology, and that such approval had not been given. On August 2, 1976 final judgment on certain counts of the amended complaint was entered for the plaintiffs, and the defendants were permanently enjoined from implementing the challenged regulations until they were approved by HEW. Defendants were directed to recalculate the amounts owed members of the class under the previously approved methodology and to the extent that any hospitals had been underpaid by the State, to pay over the difference. A twelve day stay was granted.

Defendants filed a notice of appeal from the judgment. On August 16th, the Secretary of HEW approved the major regulations which had been found invalid for lack of prior HEW approval. On August 17th, the Court of Appeals remanded the case to the district court to consider whether the Secretary's approval authorized retroactive application of the revised methodology to January 1, 1976. While this matter was sub judice, the State applied for a further stay of the August 2nd judgment. On the State's agreement to pay interest as of September 28, 1976 on any monies ultimately found to be owing plaintiffs, a further stay pending decision on the issue remanded was granted.

On October 18, 1976 the President signed Pub. L. 94-552, by which the mandatory waiver of immunity provisions of the Medicaid Act were repealed "effective January 1, 1976." Neither party brought this matter to the court's attention until after it had decided, on November 5, 1976, that the Secretary's approval was prospective only, and that the revised formula could not be implemented as of January 1, 1976 but only from August 16, 1976 (the date of HEW's approval) forward. On November 9th, an order was entered directing defendants to recompute the rates for plaintiffs' class for the period January 1st - August 16th, 1976 and to properly reimburse any members of the class who had received less than their due under the only existing approved methodology.

Defendants applied for a stay of this order, and a further stay of the August 2nd judgment; the application was denied by this court on November 22nd and by the Court of Appeals on December 14th. Subsequently, defendants began and have now substantially completed making the payments required by the court's order to plaintiffs; approximately $40 million is involved.

On the defendants' second appeal from the judgment of August 2nd and order of November 9th, they argued that the repealer legislation deprived the district court of subject matter jurisdiction to award monetary relief against the State and urged that the judgment be vacated. At the same time, defendants moved in this court to dismiss the claims for monetary relief against the State. On January 25, 1977, we denied the motion to dismiss on the ground that since the matter was then pending on appeal, we lacked jurisdiction to consider it. Subsequently, on March 16, 1977 the Court of Appeals remanded the case for us to determine the effect and constitutionality of the repealer legislation.

Two questions are now before us on the remand and the defendants' motion to dismiss: (1) was the repealer legislation intended to affect the jurisdiction of federal courts in pending cases to grant or enforce awards of monetary relief against the State; (2) if so, is the repealer legislation constitutional.

II.

The Repealer Statute

By Pub. L. No. 94-182, §111, effective January 1, 1976, Congress provided that:

> "Sec. 111.(a) Section 1902 of the Social Security Act is amended by adding at the end thereof the following new subsection:
>
> (g) Notwithstanding any other provision of this title, a State plan for medical assistance must include a consent by the State to the exercise

> of the judicial power of the United States in any suit brought against the State or a State officer by or on behalf of any provider of services (as defined in section 1861(u)) with respect to the application of subsection (a)(13)(D) to services furnished under such plan after June 30, 1975, and a waiver by the State of any immunity from such a suit conferred by the 11th amendment to the Constitution or otherwise."

42 U.S.C. §1396a(g). The penalty for noncompliance, that is, for failure of a state plan to include a consent to suit in federal court, was contained in 42 U.S.C. §1396b(l):

> "Notwithstanding any other provision of this section, the amount payable to any State under this section with respect to any quarter beginning after December 31, 1975, shall be reduced by 10 per centum of the amount determined with respect to such quarter under the preceding provisions of this section if such State is found by the Secretary not to be in compliance with section 1902(g)."

By Pub. L. No. 94-552, enacted October 18, 1976, Congress provided:

> "That subsection (g) of section 1902 of the Social Security Act and subsection (l) of section 1903 of such Act are repealed.
>
> Sec. 2. The amendments made by the first section shall take effect as of January 1, 1976."

Plaintiffs argue that by repealing the mandatory requirement that a state plan must contain a consent to suit and waiver of immunity, Congress did not intend to affect the jurisdiction of district courts in pending cases. They argue "That the removal of a requirement that a state must consent to the exercise of federal judicial power and waive its 11th Amendment immunity does not amount to an ouster of jurisdiction, does not automatically void waivers previously executed and does not authorize the State defendants to withdraw their waiver insofar as it affects this lawsuit."[2/] Defendants answer that the only basis for our jurisdiction to enter money judgments against them was the waiver of immunity exercised pursuant to earlier federal requirements; that when the federal requirement of a waiver was repealed retroactive to its effective date, the waiver itself was extinguished retroactively; and that any judgments entered during the period in which the waiver was in effect, which have not become final after appeal or failure to seek appeal, must be vacated.

It is clear from the legislative history that in repealing §1396a(g) and the penalty provisions of §1396b(l), Congress did not explicitly address the effect of the repealer on pending litigation. It is also apparent, however, that plaintiffs' argument that Congress' sole concern related to the penalty provisions is incorrect.

The Senate Report accompanying Pub. L. 94-552 (Sen. Rep. No. 94-1240) indicates that the reason for initial adoption of the mandatory consent to suit provisions was that "[d]uring 1975, several states instituted alternate payment mechanisms [for medicaid reimbursement] without first obtaining Secretarial approval ... Hospitals claimed the methods resulted in 'less than reasonable cost' payment but, under existing law, they had no recourse to compel State compliance with the statute..." 1976 U.S. Code Cong. & Adm. News 5650. Thus, "Section 1902(g) [1396a(g)], which requires that States waive their constitutional immunity to suits for money judgments in federal court, was designed to afford providers access to a judicial remedy for purposes of enforcing their legal rights." Id. However, in explaining its support for the House-proposed repeal, the Senate report states that:

> "upon reconsideration of this matter, the Committee is unconvinced ... of the desirability of compelling States to waive their constitutional immunity to suit or of the feasibility of assessing monetary sanctions against States failing to do so in a time of economic stringency at all government levels. For this reason, the Committee strongly recommends that the Senate act expeditiously in repealing this well-intentioned but, in retrospect, inappropriate legislation." Id.

The report then recommends that HEW develop alternative ways of assuring that hospitals' rights to reasonable costs be protected, and concludes with an emphasis that the repealer does not affect the hospitals' right to prospective injunctive relief. Thus, the Senate Report makes clear that the repealer was designed to remove both the 10% penalty and enforced consent to suit -- both aspects of the initial legislation.

The House Report (H.R. Rep. No. 94-1122) accompanying the initial proposed repealer legislation shows even greater concern over the undesirability of suits against the states. The first reason in support of the repeal was that:

> "[I]n an effort to deal with a particular situation which had arisen in one or two States [freezes on Medicaid rates unapproved by the Secretary], a provision was adopted which now requires all States to waive one of their basic rights -- immunity to suit. Further it required them to waive their immunity to suit on all questions relating to the payment of the reasonable cost of inpatient hospital services.... The Department of Health, Education and Welfare, the Governors and Attorneys General of the States are all concerned that the result will be an unreasonable burden of suits which will be costly in terms of time and legal manpower, and which will make efficient program administration virtually impossible."
> H.R. Rep. No. 94-1122, 94th Cong., 2d Sess., May 11, 1976 at 4.

As further reasons supporting repeal, the House Committee noted the "sizeable penalty" provisions provided, that some states had been unable under state law to amend their plans in time to avoid those penalties and that other states had refused to make the change "because of their strong concern about the inadvisability of waiving their immunity." Finally, the Committee remarked that "serious questions have been raised concerning the constitutionality of the provision. At least 12 States have instituted suits challenging it." Id. at 5. The House Report, like the Senate's, noted that there remained a problem of assuring that providers were reimbursed for "reasonable costs" and urged HEW to develop administrative mechanisms to deal with the matter. Nonetheless, it concluded that "the urgent nature of the problems occasioned by the provisions [of the mandatory waiver statute] require immediate action to remove it from the law."

Plaintiffs make much of the fact that the House Report stresses the fact that without repeal there "will be" a great burden of suits upon the states, suggesting that this manifests a congressional concern only with future lawsuits and not with pending litigation. The argument is based on too slender a reed to warrant relief. The House Committee Report was filed on May 11th (5 days after this lawsuit was filed and before issue was joined). It was not unreasonable for the House Committee to believe that in the five months since the mandatory waiver had become effective, few instances of litigation would have been commenced or advanced to a significant point. Indeed, such a supposition would have been correct, since neither party to this case has found any other case in which a money judgment has been entered against a state in a suit brought against a state in federal court pursuant to the waivers exacted by the now repealed legislation. In sum, we find no basis for believing that Congress affirmatively intended that its actions should leave pending litigation unaffected. Rather, in our view both reports indicate a pressing desire to remove federal court jurisdiction over suits for money judgments against States: (1) because such suits would interfere with administration of the Act and (2) because coerced consent to such suits was deemed by Congress to be an unwise, if not unconstitutional, remedy for a difficult problem.

Accordingly, we conclude that while not written in such terms, Congress' intent in enacting the forced waiver provision and in repealing it was to expand and contract, respectively, the district court's jurisdiction over suits by Medicaid providers against the states.

We also believe it likely that had Congress directly addressed the problem at hand it would specifically have provided that pending but appealable judgments be vacated. To conclude otherwise would be to assume that Congress intended to sponsor the anomoly of penalizing those states, such as New York, which complied with the original federal command by waiving immunity (though under protest) while rescuing from possible liability the disobedient states who refused in the first instance to obey the Congressional command to waive immunity.

Congress' intent, in short, was to undo completely what it had wrought in enacting the forced waiver provision. Plaintiffs argue that the brevity of the repeal statute suggests a lack of Congressional intent to affect pending lawsuits. On the contrary, we find that its brevity is strong evidence of Congress' intent as fully as possible to wipe its previous "mistake" off the books. The reasoning of the court in de Rodulfa v. United States, 461 F.2d 1240 (D.C. Cir.), cert. denied, 409 U.S. 949 (1972), is relevant. There, subsequent to a district court judgment for plaintiffs and while portions of the judgment were on appeal, Congress passed a statute which provided that:

> "On and after October 17, 1940 [the original enactment date of the predecessor statute] ... the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans ... shall be final and conclusive and no other officials or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise."

Although Congress had been aware of the pendency of many lawsuits challenging such administrative decisions at the time of the enactment in 1970, neither the legislative history nor the face of the statute purported to deal with its affect on pending litigation. The Court of Appeals (Robinson, J.), nonetheless found that Congress did intend to withdraw jurisdiction in pending cases:

> "We cannot reconcile the specification in the amended section of a date almost 30 years earlier with any notion that Congress intended these proscriptions to apply only to litigation commenced from the date of amendment forward. We see no purpose to be served by reaching back to the effective date of the older finality statute [other] then to impart to it a meaning Congress felt it should always have had. That objective could be achieved only by intercepting ... claims already in court as well as those that had not arrived, and that is obviously what Congress did." 461 F.2d at 1249.

Similarly, we believe that here, in repealing the forced waiver provision as of its own initial effective date, Congress intended to reach all pending as well as future cases.

Plaintiffs urge that such cases as de Rodulfa are inapposite because here Congress did not expressly withdraw or limit the jurisdiction of the federal court but merely permitted states which did not wish to be sued in federal court to withdraw their consent to suit without suffering a monetary penalty. It argues from this that the State's waiver of immunity itself was the jurisdictional prerequisite for entry of the prior money judgment, and that the repealer of the statute does not affect the validity of the waiver which was in effect at the time the judgment was entered. We would agree that a state ordinarily ought not be permitted to waive its immunity to suit -- for example in the hope of securing a favorable verdict -- and withdraw its consent to be sued if it loses the case. But no such case is before us. New York's waiver in this suit was found to be valid, not because it was "voluntary" in the usual constitutional sense, but because Congress required and intended to require such a waiver as a condition to receipt of federal funds. See Employees of the Department of Public Health and Welfare of Missouri v. Missouri Public Health Department, supra, 411 U.S. 279; Parden v. Terminal R. Co., 377 U.S. 184 (1964). Congress' intention having changed, and Congress having evinced an intention to undo altogether the effects of its earlier requirement, the waiver executed solely to comply with Congress' earlier intention must be deemed void as of the date made.

Finally, plaintiffs argue that the State twice voluntarily waived immunity and is therefore estopped from presently asserting immunity. Waivers are claimed to arise from (1) the representation of an Assistant Attorney General for the State of New York, made during oral argument on the motion for a preliminary injunction, that if an injunction did not issue the State would pay the plaintiffs any monies owed them, and (2) on his representation in connection with the stay granted following the first Court of Appeals remand that the State would pay interest on any monies ultimately required to be paid to the plaintiffs. Neither of these acts constituted a waiver of the State's immunity. See Knight v. State of New York, 443 F.2d 415, 419 (2d Cir. 1971); Ford Motor Co. v. Dept. of Treasury, 323 U.S. 459 (1945). At the time the first representation was made the State's original claim that its 11th Amendment immunity had not been waived because the waiver was under protest had not been decided by this court, and it is inconceivable that in such a posture the Assistant Attorney General could have intended the State to waive the very immunity to which it claimed a right. The second representation was clearly intended to take effect only if the State was ultimately found to owe the plaintiffs money in this lawsuit -- the very issue raised by the 11th Amendment question. Finally, even if either of the Assistant Attorney General's statements could be construed as an unequivocal waiver, there would be serious doubts as to his authority to bind the State. See In re Woitasek, 179 Misc. 947, 40 N.Y.S. 2d 514, 515 (Sup. Ct. N.Y. Cty. 1943); N.Y. State Const., Art. III §19; Art. VI §9; Art. VI §18.

Accordingly, we find that the repealer legislation requires vacating the August 2nd judgment and dismissal of claims for monetary relief against the State defendants.

III.

Constitutionality

Plaintiffs contend that in order to avoid difficult constitutional questions, the repealer legislation should be construed not to invalidate the August 2nd judgment. They argue that three constitutional defects would result from interpreting the repealer to vacate the August 2nd judgment: (1) to vacate the prior judgment would deprive plaintiffs of their property right to the judgment without due process of law; (2) permitting the State to withdraw its waiver of immunity would deprive plaintiffs of their property interest in the State's consent to suit without due process of law; and (3) permitting the State to withdraw its waiver of immunity would impair its contract with plaintiffs in violation of Art. I, §10 of the United States Constitution. Although these claims raise serious and troubling questions, defendants' position -- that the repealer legislation, even if so construed, is constitutional -- has substantial and persuasive support in precedent.

Plaintiffs rely on McCullough v. Commonwealth of

Virginia, 172 U.S. 102 (1898) for the proposition that after a trial court judgment has been entered in favor of plaintiff, the judgment may not be affected by a subsequent change in the law upon which it was based, even if the change in law occurs while an appeal from the judgment is pending. In McCullough, holders of state bonds had won a trial court declaratory judgment that their bond coupons were genuine. While an appeal was pending the Virginia legislature repealed the jurisdictional statute authorizing plaintiff's suit. After the Virginia Supreme Court reversed the trial court (on other grounds), the Supreme Court on writ of error restored the trial court judgment. It held, in part, that the Virginia state legislature lacked power to divest plaintiff of his judgment, because:

> "the question presented ... was whether at the time it was rendered [the judgment] was rightful or not. If rightful the plaintiff therein had a vested right which no state legislation could disturb. It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of a legislature to disturb the rights created thereby ceases." 172 U.S. at 123-24.

If McCullough still represents an accurate statement as to when a plaintiff obtains a "vested right" in a judgment, then plaintiffs here prevail. For reasons set forth below, however, we agree with the defendants that modern concepts of the finality of judgments substantially undercut McCullough's reasoning on that point, and that the holding in McCullough must be viewed in light of its distinctive circumstances.

The Virginia State legislature's action in McCullough was the last in a series of legislative maneuvers designed to repudiate the State's bondholders' right, conferred by the law pursuant to which the coupons had issued, to use their bond coupons to pay State taxes; in effect, to expropriate their property without just compensation. The withdrawal of jurisdiction there did not result merely in the extinguishment of a remedy available to enforce the bondholders' rights, but rather in the extinguishment of the obligations themselves. Such legislative action -- either by state legislatures or by Congress -- is constitutionally prohibited. Lynch v. United States, 292 U.S. 571 (1934); De La Rama Steamship Co., Inc. v. United States, 344 U.S. 386 (1952).

In the instant case, however, Congress has not sought to extinguish plaintiffs' right to reimbursement for their reasonable costs of providing inpatient services to Medicaid recipients. Rather, it has removed one quite recently installed enforcement mechanism for securing those rights.[3/] HEW continues to play a role in assuring that the states pay plaintiffs their reasonable costs, and the hospitals are permitted to participate in HEW's administrative review proceedings on this point. Moreover, plaintiffs remain free to assert their claim in the New York Court of Claims. Accordingly, the circumstances present in McCullough are distinguishable from those involved in the instant case.

Moreover, the determination that a trial court judgment cannot be legislatively divested, as expressed in McCullough, has been rejected by virtually every federal court which has since considered the issue. Indeed, the prevailing modern rule was early expressed by Chief Justice John Marshall, in United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801):

> "If subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed ... in great national concerns ... the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, which cannot be affirmed but in violation of law, the judgment must be set aside."

In short, an appellate court on direct review of a judgment "must apply the law in effect at the time it renders its decision," Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268, 281 (1969); accord, Bradley v. Richmond School Board, 416 U.S. 696 (1974).[4/] "A change in the law between a nisi prius and an appellate decision requires the appellate court to apply the changed law." Ziffrin, Inc. v. United States, 318 U.S. 73, 78 (1943).

Plaintiffs argue that none of the Supreme Court decisions on which defendants rely (see pp. 13-14 of plaintiffs' brief) involved situations "in which a change of law operated to divest a plaintiff of his judgment," and accordingly, that such decisions as Ex Parte McCardle, 74 U.S. (7 Wall) 541 (1867) and Bruner v. United States, 343 U.S. 112 (1952) are distinguishable from and not inconsistent with McCullough. The argument is unpersuasive. Nothing in the text of the decisions discussed in plaintiffs' brief supports a distinction between application of intervening change of law on direct appeals from judgments in plaintiffs' favor on the one hand, and defendants', on the other. To the contrary, in Thorpe v. Housing Authority, supra, plaintiff, a landlord had successfully procured a judgment of eviction which was nonetheless remanded in light of intervening change of law. Moreover, in 149 Madison Avenue Corp. v. Asselta, 331 U.S. 199 (1947), plaintiff's money judgment for overtime pay had already been affirmed by the Supreme Court itself when Congress enacted a statutory change affecting the district court's jurisdiction in the Portal-to-Portal

Act; on the defendant's motion for reconsideration of its decision, the court remanded the case to the district court for consideration of the new statute's effect. 331 U.S. 795 (1947). The district court, reasoning that the new legislation could constitutionally be applied to modify or destroy plaintiffs' claims "at any time before they have been reduced to unreviewable final judgments," and that "a complainant has not any vested right in the decree of the district court while it is subject to review," 79 F.Supp. 413, 415 (S.D.N.Y. 1948), ultimately vacated the judgment in plaintiff's favor. 90 F.Supp. 442 (S.D. N.Y. 1950).

Thus, we conclude that regardless of the decision in McCullough, a plaintiff in the circumstances of this case has no vested right protected under the due process clause in a trial court judgment until that judgment has become unreviewable. In reaching this conclusion we agree with the Court of Appeals for the District of Columbia in de Rodulfa v. United States, supra, 461 F.2d 1240. There the court concluded that Congress' intent, in withdrawing federal court jurisdiction to review certain administrative determinations of veterans' death benefits, had been to withdraw jurisdiction in pending cases. (See discussion in Part II, supra.) It therefore held that the money judgments then before it on appeal, although earlier validly entered by the district court, must be vacated. Judge Robinson's reasoning, with which we agree, was that an appeal is not "a new suit in the appellate court," but "a continuation of the suit in the court below," and that the suit remains pending until the appeal is determined. 461 F.2d at 1253. Accordingly, he concluded that the fact that "the judgments antedated the amendment makes for no difference in result as to so much of the judgments as were brought here for review." 461 F.2d at 1251. Judge Robinson specifically quoted from *McCullough* to the effect that once a judgment becomes final legislative action cannot affect it, 461 F.2d at 1252, notes 61, 62, but found simply that "It is evident ... that these precedents [i.e. *McCullough* and related cases] have no application here since, owing to the instant appeals, the awards of counsel fees never became final." 461 F.2d at 1252-53. Thus, while the basic principle expressed in *McCullough* retains vitality, its view that a judgment, though on appeal, creates vested rights can no longer be accepted: "the portions of the judgments [on appeal] were not investitures of rights ipso facto unalterable by the legislature." *de Rodulfa v. United States*, *supra*, 461 F.2d at 1253. Accord, *de Dampitan v. Administrator of Veterans Affairs*, 516 F.2d 708 (D.C. Cir. 1974). See also *Battaglia v. General Motors Corp.*, 169 F.2d 254 (2d Cir.)

cert. denied, 335 U.S. 887 (1948).

In light of the singularity of the McCullough case, and the great weight of other authority , we hold that a plaintiff has no vested right in the judgment which is protected by the due process clause until the judgment has become final and unreviewable. Accordingly, plaintiffs' first argument must be rejected.

Plaintiffs' arguments that the withdrawal of the State's consent-to-suit violates its due process and contractual rights are answered, in our judgment, by the Supreme Court's holding in Lynch v. United States, 292 U.S. 571 (1934). There, Congress had provided in the War Risk Insurance Act for yearly renewable term life insurance contracts to veterans. Plaintiff, the beneficiary of one such contract sued to recover amounts alleged to be due under the contract. The United States argued that The Economy Act of 1933, which had repealed "all laws granting or pertaining to yearly renewable term insurance," withdrew the United States' consent to suit and thus deprived the court of jurisdiction over the claims.

The court held, first, that plaintiff had a property interest in the contract protected by the due process clause and that by attempting to abrogate its obligation to pay amounts due under the contract, Congress had violated the Fifth Amendment's injunction that property not be taken without just compensation and due process of law. However, the court rejected plaintiff's argument that the government's consent to suit could not be withdrawn without impairing the contract:

> "Contracts between individuals or corporations are impaired within the meaning of the Constitution whenever the right to enforce them by legal process is taken away or materially lessened. *A different rule prevails in respect to contracts of sovereigns* ... The rule that the United States may not be sued without its consent is all embracing ... *Although consent to sue was ... given when the policy issued, Congress retained power to withdraw the consent at any time*. For consent to sue the United States is a privilege accorded; not the grant of a property right protected by the Fifth Amendment. The consent may be withdrawn, although given after much deliberation and for pecuniary consideration.... The soverign's immunity from suit exists whatever the character of the proceeding or the source of the right sought to be enforced." 292 U.S. at 580-82 (emphasis added)

What is significant where consent to suit is withdrawn by a sovereign, wrote the Court, is whether such withdrawal "impl[ies] repudiation." *Id.* at 582.

> "When the United States creates rights in individuals against itself, it is under no obligation to provide a remedy through the courts... It may limit the individual to administrative remedies ... And withdrawal of all remedy ... would not necessarily imply repudiation. So long as the

> contractual obligation is recognized, Congress may direct its fulfillment without the interposition of either a court or an administrative tribunal."

The reasoning of the Court in Lynch concerning the federal government's right to withdraw its consent to sue at any time without impairing its contracts should apply *a fortiori* to states, expressly protected by the 11th Amendment, and to federal legislative action designed to relieve the states from a previously required waiver of immunity. While the Lynch Court found that there had been a repudiation, since the government refused to make any payments on the contracts, in the instant case there is none. The defendants here continue to recognize their statutory obligation to pay "reasonable costs" as reimbursements to the hospitals; the dispute is as to the amount of those costs. Moreover, the hospitals are not without other legal redress to secure their rights; for example, as we have pointed out, HEW continues to have responsibility for assuring that state plans actually result in payment of reasonable costs, and the hospitals as providers may participate in the administrative review proceedings. Furthermore, we understand that plaintiffs have already asserted alternative claims for money judgments against the State in the New York State Court of Claims. Finally, plaintiffs remain free to sue the states in federal court for prospective injunctive relief if the States act in violation of federal law. Thus, it cannot be said that Congress, by enacting the repealer legislation, has either foreclosed all remedies or effective enforcement of a substantive right, or repudiated the substantive right itself. Accordingly, we find no constitutional violation on these grounds.

We conclude that the repealer statute is constitutional even though it results in vacating the August 2nd judgment and dismissal of the claims for monetary relief against the State.

IV.

Plaintiffs' final argument is that under the standards set forth in Bradley v. Richmond School Board, supra, 416 U.S. 696, it would be a "manifest injustice" to apply the repealer legislation retroactively so as to vacate the previously entered judgment. Although we are not unsympathetic to plaintiffs' position, having found (in accordance with the great weight of district court authority) that the State acted in blatant disregard of the federal requirement that the Secretary approve prior to implementation changes in the formula used to determine the State's reimbursement for inpatient services provided under Medicaid, we cannot agree that Bradley is apposite. The issue there was whether the district court erred in awarding attorney's fees for work done prior to the enactment and effective date of a statute authorizing awards of attorneys fees in school desegregation cases. Bradley stated the general rule, in determining whether a statute may be given retroactive effect, to be that a "... court is to apply the law in effect at the time it renders its decision, unless doing so would result in a manifest injustice or there is statutory direction or legislative history to the contrary." 416 U.S. at 711.

Bradley, however, did not address the question whether creation of a "manifest injustice" through retroactive application of a law which Congress expressly stated to be retroactive would require the court to ignore the effect of the change in statute. Given the clear rule that Congress has power at any time to withdraw jurisdiction from the federal courts in pending cases, it does not seem to us that Bradley is relevant, even if plaintiffs could establish that the repealer legislation worked a "manifest injustice" upon them. Moreover, we doubt plaintiffs' ability to establish this proposition. Although no doubt the State acted in violation of law, the Secretary of HEW has now determined that the formula used by the State, and by which we understand the hospitals were compensated in 1976 (excluding the amounts paid over in accordance with our judgment) provided the hospitals with reimbursement for their "reasonable costs." Although this question is presently at issue in the lawsuit, regardless of the outcome on that issue the Secretary's finding that the formula does provide reasonable costs reimbursement is strong evidence that if an injustice exists, it is not "manifest." Moreover, there remains the possibility that the hospitals will still be able to recover the amounts involved in the August 2nd judgment in the State courts.

Thus we conclude that the "manifest injustice" rule is no bar to vacatur of the August 2nd judgment.

For the foregoing reasons, the judgment of August 2nd is vacated insofar as it awards plaintiffs monetary relief against the State defendants, and the motion to dismiss the complaint insofar as it seeks monetary relief against the State is granted.

Submit order on notice.

Dated: New York, New York
August 4, 1977.

MORRIS E. LASKER
U.S.D.J.

FOOTNOTES

1. Plaintiffs challenge numerous other aspects of the new State plan as well.

2. Brief for Plaintiffs-Appellees filed December 30, 1976 in Court of Appeals case 76-617.

3. From 1966, when the Medicaid program first came into effect, until January 1, 1976, hospitals had no statutory right to sue States to secure the "reasonable cost reimbursement" which the statute has, since its inception, required.

4. See discussion in Part IV, *infra*.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., et al.,

Plaintiffs,

- against - 76 Civ. 2027

PHILIP TOIA, as Commissioner of Social Services of the State of New York, et al.,

Defendants.

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New York, New York
August 11, 1977

Before:

HONORABLE MORRIS E. LASKER,

District Judge.

Appearances:

MR. IMBERMAN

MR. SCHERER

MR. NADEL

MS. ADLER

MR. SAYLER

MS. BARALD

MS. SHTASEL

Appearances (Cont'd):

MR. O'CONNOR

MS. BLUM

Also present:

MR. GEORGE ALLEN

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THE COURT: Ladies and gentlemen, as you know, I asked you to meet with me today to consider what the impact of my recent decision holding that the repeal of the former immunity statute, as I will call it, which had the effect of requiring the vacating of my judgment of a year ago, would be on matters pending in this case; particularly with regard to the subject matter that remains to be tried, whether it would be affected in any way or would not, and secondly, what effect, if any, that decision would have with regard to the pending motions by the United States Government to dismiss as to them and by the plaintiffs for summary judgment against the United States Government.

I should say that I would like you to discuss not only what subjects you think remain but how the timing of the appeal that I assume the plaintiffs will make from the decision may or may not affect the decision, and I think, Mr. Imberman, it's probably logical to call on you first since you are the one who is asking for relief -- you and Mr. Nadel.

MR. IMBERMAN: If your Honor please, it is our view that your opinion of August 4th has no effect on the trial. The issues that remain to be tried, the substantive issues that remain to be tried, are precisely the same issue[illegible]ere in the case before your Honor's opinion came down [illegible]ur Honor very carefully noted, if I recall, that you were vacating judgment only insofar as it requested monetary relief.

THE COURT: Right.

MR. IMBERMAN: That leaves in the case our request for declaratory relief or injunctive relief and the basic issues under federal law still remain to be decided and, if anything, I would say your Honor's decision increases the need for a prompt trial because every month that goes by, assuming your Honor is correct, I can't get a judgment if I am right.

THE COURT: You mean if I am right. If I am right and you are right about whether I am right.

I understand that, although I don't know what you can do anywhere else.

Mr. Sayler, am I correct in believing that although the state defendant's motion to dismiss under the 11th Amendment, I think, did go so far as to suggest that the whole case should be dismissed; that it is pretty clear that the Court does have jurisdiction to grant prospective relief?

This obviously goes to the question that Mr. Imberman has addressed.

I believe that to be your position and if I am wrong, I would like to be advised.

MR. SAYLER: Your Honor, we believe that the limit of your jurisdiction is just that, prospective relief, either prospective declaratory or --

THE COURT: I understand that but we do not have a quarrel, do we, that this Court does have authority to grant prospective relief if it is appropriate?

MR. SAYLER: No, there is no quarrel on that, your Honor.

THE COURT: I understand Mr. Miller, your Mr. Miller, to have argued in the past that in his view there would be very little left to try because the 1976 regulations are not in effect any more in the sense that this is now 1977 and that the 1977 regulations are substantially different from the 1976 regulations but I think the answer to that, as far as Mr. Imberman is concerned, is that some of the features, anyway, that he most complains of are still in effect.

MR. IMBERMAN: Absolutely.

MR. SAYLER: And I think the answer to that, your Honor, is we have now had a new round of HEW consideration and an approval of a methodology in toto in 1977. That has not be challenged at all in the case. There is nothing in the record before HEW in 1977.

The only record we have respecting HEW approval was their approval in 1976, an approval which extended through March 31st of 1977, but went no further. That's the first point I want to make and we've had a new round of HEW consideration.

THE COURT: Let me react if I may to the points as they are raised.

I see that and I don't think it is relevant.

On the other hand, it seems to me that that would be more significant probably -- well, thinking out loud, it would clearly be significant vis-a-vis HEW. I mean, I suppose HEW takes the position that if the '77 situation is to be attacked, they are entitled to present the record for '77 and have it acted on on its own merits. I suppose the state would tag along there and say that if

I find that HEW did okay in '77, that ends it as far as the state is concerned, too.

Is that your position?

MR. SAYLER: That's right. And I wanted to add, your Honor, that the changes that were made in 1977 were quite significant, changes that cut across --

THE COURT: I don't remember what they were but I do remember they were significant.

Do you want to remind me?

MR. SAYLER: A very major change was the grouping approach used by New York pursuant to which hospitals are put in individual groups and then ceilings applied against the groups was totally revised pursuant to a new system called cluster analysis, in which a number of factors were cranked into the groups at the behest of plaintiffs and others.

A new system was worked out. That then went to HEW and HEW considered it and approved it. That's the system we are now following. We are not following the old system. And there were other changes to most of the major provisions that have been challenged in this case but I want to add that that, even to the extent that some provisions in the current methodology have their forerunner in 1978 and some of them are in haec verba, there is no doubt, we still believe that what the Court has to focus on in providing prospective relief only is the plan as it works now as a whole. It is of no value, we believe, for your Honor to be looking at bits and pieces that were carried over into 1977, if very major changes were made in the way the program works as a whole.

You ultimately have to decide if a hospital is getting reasonable costs, not if a particular subdivision seems fair on its face, but how the whole package works and it works differently this year, very much so, so much so that we have gone back for another approval of the HEW and if you are to tell the parties whether the program is lawful for the future or what we ought to do to make it lawful, we would think you would want to start with the program we now have.

THE COURT: I understand all those things. I would be less than candid if I did not say I was deeply concerned by Mr. Imberman's point, that if he is entitled to relief, as each month goes by he necessarily loses the relief, if my theory of the law is correct, and it certainly would be true if there had never been an immunity statute at all.

Therefore, perhaps what we should concentrate on here, in addition to pointing out how the situation may be changed by any decision, is to find out what the parties do agree would be right for trial so that we can at least eliminate whatever issues can be eliminated.

These are quite complicated propositions that almost go beyond normal judicial questions and it is bothersome to think that the hospitals, if they are not getting reasonable costs, should stand waiting for that kind of relief for a long period of time.

Do you see anything that would be triable at the time?

MR. SAYLER: Your Honor, I am not pushing for a delay of the trial.

THE COURT: I did not mean to suggest that you are.

MR. SAYLER: You are not. What I am saying now is these plaintiffs have had, for many months, an opportunity to challenge the 1977 approval and the 1977 methodology if they desire to do so. They haven't challenged it in a state court proceeding.

THE COURT: Mr. Imberman is going to give us some light on that point.

MR. IMBERMAN: Your Honor, if your Honor please, you have to understand that once we have challenged in this complaint certain basic regulations insofar as the fact that they do not produce reasonable cost reimbursement is concerned, that's it as far as the challenge is concerned and it is now before this Court to determine.

The fact that in 1977 the state saw fit to make some other changes to the plan which HEW approved but kept intact the principal ones that we are challenging doesn't mean that every year I have to file a new lawsuit challenging the same things. I have already done it.

THE COURT: I would be constrained to agree with that to the extent that we are talking about major features. I can imagine minor features which you might feel were such that one had to consider the whole package and, of course, you are right that ultimately they have to move, the plaintiffs do, that they haven't received reasonable costs but I can conceive of the situation in which I might, or a trier of fact might, be persuaded, and this certainly has been Mr. Imberman's contention almost from the beginning, that by and large, the hundred percent average is going to result in less than full and reasonable costs and, if he is right on that, he is entitled to at least declaratory relief of some kind and we have to perhaps iron out the fine points as to some situations where it did grant reasonable costs and others where it did not but it doesn't seem to me that that kind of thing, that one in particular, which is fundamental, would necessarily be substantially affected by changes that might have occurred in 1977.

I do agree that the clustering of the hospitals may be significantly different; I don't know what the effect of that is.

MR. IMBERMAN: May I just say one other things, your Honor. To follow Mr. Sayler's theory through to conclusion, I can never catch up with him because every time I bring a lawsuit and it doesn't get decided by the year end, the state makes some changes in the next year and, according to Mr. Sayler, they have changed the thing so I can't sue any more; I do not have a valid lawsuit. That just doesn't make sense.

And I don't think the grouping, the changes in grouping, for example, they made in 1977, could have any effect on the validity of our lawuit or our right to ask your honor for a declaratory judgment as to whether what was in effect in 1976 produced reasonable costs or not or whether the regulations were adopted validly.

As far as 1977 is concerned, I don't know whether Mr. Sayler knows it but we've filed a lawsuit concerning various aspects.

THE COURT: He said you have. In the Court of Claims?

MR. IMBERMAN: No. In New York State Supreme Court. We've filed a lawsuit but it's a separate lawsuit and has nothing to do with this lawsuit.

THE COURT: Well, I am personally willing to decide issues put before me, provided they have not become moot and, for live issues that can be demonstrated still to be live, I am ready to decide them.

MR. IMBERMAN: Well, let me show your Honor how they are live. There are thirty some-odd appeals from 1976 rates that I know of, at least what the state admits to, that are pending now, that the state has to decide based on the 1976 methodology.

Now, certainly as far as the validity of the 1976 formula is concerned, it has a direct impact on the appeals.

THE COURT: What happens if I declare in your favor as to those appeals?

MR. IMBERMAN: Then the state would have to decide, would have to change the rates in accordance with whatever your Honor's resolution of the dispute would be. I mean it would require new rates promulgated in accordance with a proper formula.

THE COURT: In other words, you have an open account for that year?

MR. IMBERMAN: Absolutely. And it would carry over to 1977, also, your Honor.

THE COURT: I understand it's the same question except to the extent that your claim depends on inadequate review by HEW and I don't know whether you are claiming that for '77 or not.

MR. IMBERMAN: That's separate and apart.

We do not have a 1977 lawsuit in which HEW is a defendant.

THE COURT: Well, that's a careful way of answering the question.

Mr. Nadel?

MR. NADEL: I would like to address the question of mootness. Your Honor's latest ruling, the limits of it, is to the extent that we cannot get monetary relief from this Court.

THE COURT: Right.

MR. NADEL: The class action complaint asks for relief of a declaratory nature as well as other relief.

What ultimate recourse the plaintiffs may have in state court with respect to the 1976 plan, the formula employed, reimbursement thereunder depends to a great degree on what happens in this Court on two separate counts.

The issue is certainly live, not moot, as to whether the 1976 plan violates the requirements of the Medicaid Act. If it does so, plaintiffs maintain, and I understand Mr. Imberman to believe so, that we have a right to recover in state court.

But there is a subcategory of that and that has to do with the question of HEW's approval which is presented to your Honor in the summary judgment motion and it is because this is the only Court where that issue can be heard, assuming it to be reviewable.

We cannot bring HEW as a party defendant in the state court and the question of the validity of the approval is a tremendously live issue to the plaintiffs --

THE COURT: Well, it is live only to the extent that the things approved continue in existence or are features of your past, what remains open, right? I mean that is considerable but all that I mean is that obviously there is no point in beating HEW over the head if it approved, inadequately, something which is no longer in effect. If it is still in effect, that's another matter.

MR. NADEL: Well, your Honor it is the position that I stated -- I don't understand Mr. Imberman to disagree at all -- that if HEW's approval of this state plan on August 16, 1976, was void, then that approval is void ab initio and the state cannot take any rights under the plan as approved and the reimbursement must be under --

THE COURT: I take it that the 1976 approval of the hundred percent average, for example, which is the most important feature of anything that has ever been brought before me and, secondly, one that is easy to discuss, the fundamental, is the only approval that has been given. It wasn't approved as such in 1977 separate; am I correct on that?

MR. IMBERMAN: No. Your Honor, it's a plan that is approved. This is a provision.

MR. SAYLER: He is exactly right. The whole plan was approved.

THE COURT: Then let me go at it a different way, not to try to take anybody's side but to understand the facts.

I understand the whole plan is approved but, on the other hand, in certain years we know that certain things are concerned specifically and the plan is approved and in other years other things are considered specifically.

Am I correct in assuming that in 1976, 1976 if not the only year, and '77 was not the only one, certainly, was the major year for the question of the hundred percent average or was the hundred percent average reconsidered, sort of, on a plenary basis in '77.

MR. IMBERMAN: I think only the amendments considered in '77 were concerned.

MR. SAYLER: Let me say two things on that. There is no record at all before your Honor, no depositions, nothing about the HEW approval process in 1977.

But the second point of the answer is that a very major change was made to the hundred percent ceiling approach and that is, they changed the groups and it's the groups that apply against the hundred percent.

Take the logical extreme. The groups may be one hospital to a group or two identical hospitals to a group. Then the hundred percent bears differently, so it goes right to the heart of it.

THE COURT: No, there is no record on that either, but that is what brings me back to the worrisome question.

Let us assume for the moment that the only thing I decide is to boil it down to a hundred percent -- that a hundred percent average as it stood in '76 either was not adequately proved or, if adequately acted on, nevertheless produced results which violated the act.

What good will it do you if Mr. Sayler then comes back and says, "Fine, Judge, we have got an entirely new system now"?

MR. IMBERMAN: May I answer?

THE COURT: I wish you would. I am willing to do something useful but not something useless.

MR. IMBERMAN: I think the law is clear that if your Honor were to rule that the '76 amendments -- well, if your Honor grants our motion for summary judgment, the '76 amendments were not validly adopted, it seems to me that as of that moment, the only plan that could be validly in effect would be the plan in existence in 1975 and until HEW went back and "did it right," the reimbursement to the hospital would have to be in accordance with the only validly existing plan, which is the one of a year before.

MR. NADEL: I couldn't agree more.

MR. SAYLER: There are two very clear answers to that.

One, you do not have the power to enter a retroactive injunction or declaratory relief --

THE COURT: No. If I threw him a pass, he would have to run with it. Then it's his ball.

MR. SAYLER: Edelman says your entire jurisdiction is a prospective. Page 666. It says prospective declaratory. Page 666, footnote 6. It says that. Rothstein says that.

I have a file that we have been working on in the last two days that it's prospective only, and that you could not enter a declaratory judgment providing that the 1976 plan was invalid. That would either be an advisory opinion, which you have indicated you do not want to do, or its only purpose would be to set up a money damages claim in some other court.

Case after case after case says that's an evasion of the prospective only; eleventh amendment in your jurisdiction.

THE COURT: It's your opinion that this Court doesn't have jurisdiction or power, or whatever word we are going to use, under Edelman to do anything but enjoin the state for the future?

MR. SAYLER: For the future. That's what Edelman and Rothstein and the other cases say. And the one thing you cannot do is to enter a declaratory judgment for the purpose of setting up a money damages claim in a state court.

THE COURT: I would not do that.

MR. SAYLER: What other purpose is there for saying the '76 methodology is invalid. There is a '77 methodology and Mr. Imberman says go back to '75. Why don't you stay with '77.

MR. IMBERMAN: I can answer that. Because the

'77 plan is based on '76 and if '77 is valid, '76 is invalid and '77 can't be valid.

MR. SAYLER: Oh, no. It may have been approved.

MR. O'CONNOR: One, I think it's important that the concept of the plan has to be viewed as a whole. I think what the discussion is indicating is that there is a new issue of fact involved and the new issue of fact is how close is the 1977 plan to the 1976 plan and right now, based upon the amount of time that we have had, the fact is, I don't know the answers right now to a lot of these questions but I would like to say that assuming that the Court holds that the plaintiffs are right on all of their claims, the way everything is now I do not see how that could go beyond the period, how that could be pertinent to any other period than August 16, 1976, to whatever the date was in March of 1977 that the amendments were approved.

Let's just say the plaintiffs win everything, all their contentions. When you get to the prospective relief, the state and the federal government could still be using the 1977 plan and the plaintiffs could argue, "Well, you can't do that any more because the '76 plan is the same and has been declared invalid," and the other defendants could argue, "No, you are wrong, it's a different plan."

Right now at this table I do not see a resolution to that. I don't know the answer myself, whether they are right or wrong, but it seems clear that until that issue is resolved any decision with regard to the 1976 approval can't go beyond March, 1977, until the issue of whether the '77 plan is so similar to the '76 as to also be invalidated has been presented to you, to a Court, and decided.

THE COURT: Why, Mr. O'Connor and Mr. Sayler, why are the plaintiffs not entitled to a ruling on the question of whether or not the hundred percent average can meet the requirements and does meet the requirements of the Medicaid Act and if they create a certain record as to what the facts are at that time, unless you put something else into the record, those are the facts on which I proceed, then, right? I mean, you have got some kind of a ruling which will guide you as to whether it is ever legal and if so, under what circumstances, perhaps.

MR. O'CONNOR: May I respond?

THE COURT: I agree with you that it is not a satisfactory state of facts to deal with and I think one of the reasons that it is not is because the eleventh amendment as construed by the Supreme Court and I wouldn't quarrel with them on it, produce what are in other circumstances very unnatural results -- that is, that you can't recover the money but you can establish a principle, and assuming you are right, and I think you probably are right, that Edelman literally means prospective relief -- still that doesn't mean, it seems to me, that this Court can't say to the state, in appropriate circumstances, "You simply can't establish a hundred percent average."

I do not say I would come to that conclusion but that is something it seems to me that gives the Court something to work on, so to speak.

MR. SAYLER: I think that is right but I think you would want to know two things before you did that: Why HEW had approved the present plan and whether they thought about how the average would work under the new method and how the new methodology works because that bears on --

THE COURT: I might, but is there anything to prevent you from putting that in the record, even if the plaintiffs are not complaining about it?

If you allege that --

MR. SAYLER: They are not challenging it.

THE COURT: No, but if you believe it's relevant, I would then have to decide whether it is or not. I might, in view of the peculiarities of the framework.

MR. SAYLER: I agree with your basic proposition. I may be quibbling, but there is no reason why, in the abstract, you can't say that the hundred percent ceiling is, on its face, illegal.

THE COURT: If it's a question of "on its face," I would not want to take into consideration HEW but never mind; I may be quibbling now, too.

All I mean is that there is a point where one can conceive of circumstances under which such a ruling would be possible, and if so, that the plaintiffs have the right to ask me to make it. Maybe the chances are nine out of te[illegible] I'll rule against them.

MR. NADEL: I do feel obliged to advise the Court, even though I do think it is somewhat off the point, that the Hospitals Corporation has under very serious consideration a suit against HEW in the federal court on the 1977 state plan.

But as I mentioned, I do think it somewhat irrelevant as to what happened on this go-round.

The question is between August 16, 1976, and March 31, 1977, the state had an obligation under federal law to reimburse the hospitals in accordance with the Medicaid Act and in accordance with the plan approved by HEW.

That is the critical period. It is the plaintiffs' contention that they did not do so.

It is the plaintiffs' intent to get a money judgment in another court with respect to that period but it is only in this court where the plaintiffs can attack --

THE COURT: It's a pure question of law and Mr. Sayler seems to disagree with you absolutely as to whether I have the authority to grant you the next step in your proposed plan of battle here and either I do or I do not.

Let's take a look at the language you are relying on. Do you have it there? If not, we can look at the case.

MR. SAYLER: Your Honor, I am fully prepared to brief it and maybe what we should do is brief it to you.

THE COURT: I think that may be necessary and perhaps you can write me a letter so I can think about it. I would like to make as much progress as I can.

While you are looking, I have some disappointing news to report to you, assuming we do go ahead on the full bevy of trial issues, and that is, the Speedy Trial Act is beginning to catch up with us even more than it has in the past, referring to criminal matters.

The law, by operation of its own terms, shortened the period, effective July 1, 1977, that we now have to try criminal cases from six months to four months and the result is that for the first three weeks of this trial, I have three separate cases scheduled at the same time.

My guess is that probably two out of the three will result in pleas of guilty and have set them for trial for two reasons -- first because we had to and, second, because when you set them for trial, you are more likely to get the plea.

But I wanted you to know how the land lies. Fortunately, this is a non-jury case and I can deal with it when I have the time, but I have that discouragement to face, too.

MR. SAYLER: Pages 666 through 668. Under Ex-Parte Young, you can grant prospective declaratory relief.

THE COURT: I think the use of the word "prospective"is sufficiently widespread in opinions both before and after Edelman that we should, all of us, really think this thing through because there is no point in going through a proposition of futility here, so before we are finished, I will ask you to write me a letter and I would just as soon have it while I am away and I can be pondering it.

MR. IMBERMAN: Just what does your Honor want?

THE COURT: Let me wrap it up on this end of the thing now.

I would like to have you put in writing what remains in your opinion to be tried in the light of my recent decision and in the light of the holding, as you see it, of the courts with regard to the kind of relief --

and I am thinking primarily of Edelman, of course -- which a federal court is in a position to grant under the circumstances which we face.

And, in that regard, I would like the plaintiffs to in effect tell me what is not moot and why not and to demonstrate that I have the authority to decide whatever is not moot and I haven't called this meeting for the purpose of trying to evade any responsibility or making it easier. I just do not want to waste time and I would like the state defendants to do the opposite and HEW, as always, will be honest.

MS. SHTASEL: Of course.

THE COURT: I take it from this discussion , but I don't know whether I am right or not, that nobody suggests that my recent decision eliminates the necessity to decide either of the other pending motions, to wit, Mr. O'Connor's motion to dismiss and Mr. Imberman and Mr. Nadel's motion for summary judgment.

Am I correct?

MR. O'CONNOR: Yes. I am not suggesting that, your Honor.

MR. SAYLER: I think it logically does moot the summary judgment motion.

THE COURT: Would you explain how?

MR. SAYLER: Because of the supervision of another HEW approval which is now the effective governmental act.

THE COURT: Well, what is so frustratingly puzzling about that statement is that there is nothing in the record other than statements and letters and so forth about the superseding and --

MR. SAYLER: I understand that and I don't mean to be smart Alec about this but it's not the state defendants' fault.

The fact is if the limit of your jurisdiction is what I have suggested it is --

THE COURT: As I see it, and I am just thinking out loud at the moment, but you should comment on this in your letter and so should you.

As I see it, the plaintiffs can't prevent the state defendants -- to put it a different way, the mere fact that the plaintiffs have not complained about 1977 doesn't seem to me automatically to require the result that the defendants are not in a position to bring to the attention of the Court as evidence the facts of 1977 in defense of their own case, if it's a defense.

The passage of time and new facts that occur in any ordinary lawsuit can be brought to the attention of the Court and I don't think that just because the state -- I mean the plaintiffs say, "I am not crabbing about 1977," it doesn't mean that you can't independently say, "Judge, you should not do anything about 1976 because even if, for example, we did not do the job right in '76, we did do the job right in '77, number one, and number two, we got a whole new kettle of fish," and I can't rule on that without knowing something about it.

You will have to decide whether you think that my theory is correct or not but otherwise we are going to be frustrated with these things forever.

Just as Mr. Imberman says that you can perhaps keep him running after you forever by changing approvals each year or slightly altering the plan and saying, "Judge, it's a new package," so, on the other hand, he could frustrate you it seems to me by simply attacking this year but not the next year and if it is all one package, it's all one history, too.

MR. SAYLER: Your Honor, I agree with an awful lot of what you said and I think I just have one thing to add to it. That is, as I understand what the plaintiffs are seeking with respect to HEW approval, it is for you to order that the approval was void ab initio.

THE COURT: As far as HEW is concerned, yes.

MR. SAYLER: All right.

Now, suppose --

THE COURT: That can't be affected by '77.

MR. SAYLER: Suppose you granted that relief. You have voided HEW's mistaken action in 1976 and they have come in with a new approval.

THE COURT: I think the only issue there if the plaintiffs continue to ask me, as they do, to declare that the '76 approval was void, is now to demonstrate that a declaration to that effect would either (a) not be prospective or (b) moot, which adds up to the same thing.

MR. O'CONNOR: Could I have three or four sentences?

On the hundred percent ceiling, say it's carried forward, I just wanted to draw your Honor's attention to the fact that I think all of the parties agree, I know that in the HHC brief, they have argued as follows and HEW also agrees with this, that to the extent that you reduce the ceilings, your grouping has to be better.

You have a crude grouping, you can have more leeway. HHC in their memo stated, "Well, this works fine if all the groupings are matched pure hospitals."

MR. NADEL: Identical.

MR. O'CONNOR: Our position is that the groupings of New York State are sufficiently precise in the plan.

THE COURT: For '76?

MR. O'CONNOR: Both '76 and '77. The reason I draw this to your Honor's attention is that I do not think it's a valid, logical point to say that we can just decide whether hundred percent ceilings are valid or invalid and the reason for that is that the level of the ceiling is tied in with the precision of the groups.

If it's a fact, and I believe this is a fact, that New York State changed its grouping procedure in 1977, that's a very important concept for saying, well, you are addressing the point of hundred percent ceilings because the other side of the ceiling coin is the group coin.

A second point I wanted to make is this: Mr. Imberman's argument is that he can never catch up as far as the litigation and maybe that is so but I would just like to draw your Honor's attention to what I feel is a switch that is going on here.

The reason that I say so is not because HEW or the state made a new plan. It's because of the peculiar results of the legal doctrine that your Honor has ennunciated. The fact remains that the basic proposition is that if you want to challenge the state plan and get money, you have to go to state court and that's the reason that he is always going to be catching up. It's not because people are always going to be one step ahead of him. If he goes to state court that wouldn't happen to him and then --

THE COURT: That's a very good suggestion, Mr. O'Connor.

MR. O'CONNOR: And I do not agree with Mr. Imberman's suggestion about the timing of the case, though I am not making an argument of the point. I just wanted to clarify it. I feel it's just the reverse. Until the plaintiffs challenged the 1977 amendments, it seems to me almost as a matter of law, ipso facto, what-have-you, the best they can do is getting the 1976 plan knocked out and that will take them up to March of 1977 and since there is a definite ending date, it's exactly the reverse of what he says.

Time is no longer important at all. If he adds in the 1977 amendments, then his argument has validity but until he does that, he has a definite ending date.

THE COURT: I see what you mean. It's a liquidated amount.

MR. O'CONNOR: That's it exactly and that's the three points I wanted to make.

THE COURT: Very good point.

MR. IMBERMAN: Your Honor, I think we have probably come to the end of the road as far as what we ought to jbrp

say here and I just wanted to add something on mechanics and the point is this sounds to me like a motion so I would like that Mr. Sayler write a letter and give us time to answer it because he's raising points that, up until now, haven't been raised.

THE COURT: All right. I don't think it makes much difference who goes first but both the subjects have to be explored.

MR. SAYLER: I do not care. I principally want to know what they think remains to be tried but I am willing to take the first crack at it.

I don't know what points they think remain to be tried.

THE COURT: I think it's better to do it this way. I don't think they are moving to dismiss.

I think it is logical to ask the plaintiff to designate how and why, not what, because you have said that the subject matter of this case remains moot in view of the particular legal facts --

MR. IMBERMAN: You did not mean remains moot.

THE COURT: No. Remains viable -- in view of the proposition that the Court at least believes now, unless it's reversed, it can only grant prospective relief.

Then, let the defendants respectively comment on that and if you want to respond briefly, you can do that.

And that also puts the motivation where it ought to be because the plaintiff is more anxious, and should be, to move forward.

I will really only be gone two weeks before I come back here for a day, so send the letters here but let me at least advise you I have a summer address and you can send an extra copy and if it gets there, I'll be able to study it earlier.

It's Chilmark, Massachusetts, Box 167.

You have said there were some other mechanical matters you wanted to talk about?

MR. IMBERMAN: I wanted to address myself for a moment to the orders which have been submitted.

THE COURT: Yes.

MR. IMBERMAN: In the first place, I had asked your secretary to let you know, and I don't know whether she had a chance to but I would like to submit a modified order which would have in it a request for a stay pending appeal and I would like to ask your Honor, regardless of which order you sign, whether it's Mr. Sayler's or ours, that you incorporate in that a stay pending appeal and I know I am asking for something a little bit unusual but I think this is an unusual situation.

THE COURT: I think it's an unusual situation and I think it would be unfortunate to see this money keep trading back and forth.

I must say that when the state asked for a stay I think I granted that only on the condition that they would agree to pay interest and it seems to me that if I required that of them I ought to require it of the plaintiffs, if I am going to grant a stay.

The stay, of course, would, as it did in the case of the state, apply only in the event that the payment ultimately had to be made.

MR. IMBERMAN: The reason why I think we are entitled to a stay pending appeal is because this is such an unusual situation.

THE COURT: Yes, it's very unusual.

MR. IMBERMAN: Your Honor has twice said that the state was wrong, that they blatently violated the law and put regulations in effect without HEW approval and therefore the hospitals were entitled to receive the money which your Honor said should be paid.

Your Honor is vacating that judgment now only because Congress changed the law retroactively and you feel you have no jurisdiction.

THE COURT: Right.

MR. IMBERMAN: But certainly that has nothing to do with the merits.

THE COURT: No.

MR. IMBERMAN: Or the right of the hospitals to have received that money.

As a matter of fact, I am almost appalled that the State of New York, having heard your Honor say twice that they were in blatent disregard of the law, should now ask that the hospitals repay the money which you have said they are lawfully entitled to.

Now, under those circumstances and you know the cases are legion where courts have said, well, if a federal judge says the state should do something, I expect it to be obeyed and it's unnecessary to enter injunctions or other things, and here the State of New York is in effect thumbing its nose.

Under these circumstances, I would ask your Honor to incorporate a stay pending appeal particularly since the Court of Appeals has said that is an unusual situation.

THE COURT: I would be inclined to grant a stay and the question in my mind does boil down to whether it would not be just to include provisions for interest in the event that you have to make the payment.

MR. NADEL: Could I suggest a distinction to your Honor with respect to interest.

Your Honor required interest because the underlying money that was then in the state's hands belonged, by your decision, to the hospitals. By any stretch of the imagination, the money that is now in the hospitals' hands belongs to the hospitals, ultimately.

THE COURT: Well, it depends what you mean by the word "belong," of course. I mean if it were that simple we wouldn't be dealing with a judgment.

MR. NADEL: I mean it to be a shorthand phrase, that under the way you ruled, which the defendants did not pursue --

THE COURT: There is another way to approach this as far as the interest is concerned and that is for me to grant a stay specifying that in the event the hospitals are required to repay the money, the hospitals may be required to pay interest in the discretion of the Court upon argument by the parties at that time.

MR. IMBERMAN: I will accept that, your Honor.

THE COURT: Do you want to comment on that?

MR. SAYLER: Your Honor, I have nothing to add. Of course the state opposes the stay. The state is poor and needs the money and you have heard the arguments before.

THE COURT: Well, I granted the state a stay and I'll do it the way I just said.

MR. IMBERMAN: One or two housekeeping things, if I may raise them. I know you are anxious to get away on vacation.

There is an appeal pending before your Honor, something relating to the Magistrate's ruling on depositions that we took.

THE COURT: Let me see if it's over here.

If I have trouble finding it, I'll call you in the morning.

MR. IMBERMAN: I'll get a set of papers down to you in the morning.

There is another thing I meant to talk about before and it slipped my mind and I think almost everything I said before relates to this, and that is the provision in the state's order for recoupment -- it's a page and a half order -- the state's order has a provision which starts at the bottom of Page 1 that the plaintiffs promptly refund these funds and it was that to which I was addressing myself before and the subject of recoupment, which I think should plainly go out, regardless, stay or no stay.

It seems to me the height of effrontery in view of your Honor's holdings before that the hospitals were entitled to be paid at these rates, for the state to say, "Give us back the money."

THE COURT: Well, isn't that what all these cases are all about? Isn't that what Edelman is all about?

MR. IMBERMAN: Your Honor, there surely is a difference between a ruling which your Honor has made twice, that the state was absolutely wrong when it put these regulations into effect before HEW approved and then your Honor said that when they did finally approve, it could not be retroactive, only prospective.

Now, solely because Congress has deprived you of jurisdiction, and we are going to talk about that in a moment --

THE COURT: Of course.

MR. IMBERMAN: -- they want the money back, even though your Honor said we are entitled to it.

THE COURT: I know they want the money back and of course they do and it had seemed to me until you so ardently put it the way you do, that in every Eleventh Amendment case where there has been a judgment, the same situation applies. There has always been a judgment against the state.

MR. IMBERMAN: Judge, you know, what we have involved here is a question of restitution and restitution is an equitable remedy and many times the Supreme Court and Court of Appeals has said that restitution would not be granted where it would be inequitable and incorrect.

THE COURT: Well, I won't rule at the present time by an order that restitution is not required. If I grant a stay you will have time to put before me, in case the matter ever comes back to me, the fact that this Court has the right to do as it wishes -- that is what you are saying -- or what it thinks is right.

In the circumstances I find it a puzzling doctrine but I am prepared to consider it. Either I would not grant a stay or I simply would not make any ruling at all as to what happens until the appeal is disposed of. But it's only fair to tell you that my present thinking is that I am legally obliged to force you to repay the money.

MR. IMBERMAN: I think the way to handle that is if you signed our order and then signed a stay pending appeal, that would leave the whole thing --

THE COURT: Well, I indicated before I will not require payment pending appeal. Then what is the difference between yours and their orders? I haven't looked at it. You just vacated the order?

MR. IMBERMAN: That's right.

THE COURT: And the judgment.

That's a nice legal question.

Mr. Sayler, you look as if you are either stunned or you wish to say something. I am not sure which.

MR. SAYLER: Your Honor, I don't want to say I am stunned but I am a little bit surprised by the position. I thought what we had been fighting about from the beginning was the obligation to pay it back.

Every page of Mr. Imberman's brief to you says that if they lost this motion, argument headings, if they lose the motion pending before you, this will impose a new and unanticipated burden on the plaintiff by forcing them to look upon another form to recover the money.

That's what they argued, that their property would be taken away, contract rights would be abridged. Manifestly. That's what you decided. You marched up to that and considered the constitutional doctrine and said the law is what it is. That means we are entitled to the money back.

Whether you stay the paying back of that money is a different question but we are entitled to an order. We paid the money only because we were ordered to and that order has now been vacated and we are entitled to the money back.

THE COURT: I am inclined to agree with Mr. Sayler at this stage of the game. That's what the cases mean to me as I read them.

If you have any authority you want to bring to my attention tomorrow morning before I leave, I won't sign the order until the afternoon and of course pending appeal it's probably academic because I will sign the stay but my belief is that, if my judgment is affirmed, this judgment, that the state is entitled to the money back and I am not free to do differently.

MR. NADEL: May I suggest, instead of having counsel address so important an issue on such short notice, would it be acceptable to all if we deferred this issue until we see what the Second Circuit does and the defendant and the plaintiff have an opportunity to resettle the order and readdress the issue at that time on that point.

MR. IMBERMAN: Your Honor, I would like to suggest, if you sign our order with the stay pending appeal, you are signing an order which does not specifically direct restitution.

THE COURT: Or forbid it.

MR. IMBERMAN: Right. But the one thing I don't want to happen is, and I might as well be very frank, I don't want the state to just take this money from the hospitals.

THE COURT: They can't if there is a stay.

MR. IMBERMAN: I am glad your Honor has said that.

MR. SAYLER: We will comply with the stay, Mr. Imberman. We are entitled to that order and we will --

THE COURT: I think it is important that it be before the Court of Appeals. You will be free to argue it before the Court of Appeals, the very point that you are making to me now, and if you wish me to state on the record that I am denying your requests so that that can also be appealed, if it needs to be part of the record, I do deny the request.

I don't see why this proposition as to whether or not in the event the District Court is affirmed, the District Court has equitable discretion to determine whether and to what extent the plaintiffs should repay the funds can't be put to the Court of Appeals but as I read the cases --

MR. IMBERMAN: If your Honor please, you have discretion. I know the cases are very clear on that and I suggest to your Honor that there never was a case where discretion should be more exercised --

THE COURT: I am prepared to exercise discretion if you are right, but I am not nearly as clear as you are that I have discretion or that the Court has discretion in a special situation of this kind.

MR. SAYLER: Your ruling was that you didn't have jurisdiction so you can't have discretion.

MR. IMBERMAN: It's one thing to say that you have to vacate the judgment but it's another thing to require that money has to be paid back. There is a big difference.

THE COURT: I will sign the defendants order with a stay and with the state defendant's counsel's statement on the record that they will obey the stay, which I find encouraging but surprising that it needs to be made, and I think it's only made because of any doubt expressed by the plaintiffs and this is of course without prejudice to the plaintiffs to appeal for modification of the order in the event that that order appears to prove ineffective, to permit them to present to the courts hereafter the proposition that the District Court has discretion to deny payment in whole or in part.

MR. IMBERMAN: And the stay is to be pending appeal to the Court of Appeals.

THE COURT: That's right.

MR. IMBERMAN: Which means a hearing and determination.

THE COURT: Yes.

MR. NADEL: Do I understand your Honor to rule that your decision with respect to repayment is not an exercise of discretion but you feel compelled by it?

THE COURT: I do feel compelled. If you can prove to me the contrary, I'll exercise my discretion.

Is there anything further?

MR. SAYLER: A couple of housekeeping details and then we are done.

One, I assume we should wait until we have exchanged letters to you on what remains to be tried and we've had one more conference before we proceed to try and stipulate to all the documents that are going to come into the record.

THE COURT: I think so although I regret the cost of time on that.

MR. SAYLER: We'll talk to you before we do that.

THE COURT: Either that or we'll all agree its not necessary to talk.

MR. SAYLER: The other housekeeping deal is that we are now taking depositions of a number of hospitals and will be deposing HANYS.

The cut-off date for discovery is August 26th and we are trying to complete it by then.

We have scheduled depositions so that we can complete it by then. In some cases deponents for hospitals cannot answer some lines of questions and we need another deponent and we are trying to arrange schedules.

It is possible we will barely miss August 26th, depending entirely on the availability of plaintiffs and representatives of plaintiffs. I do not mean for a minute to say that they have been delaying this, because they have not. But there are scheduling problems. There is no one to be deposed on Friday or Monday --

MR. IMBERMAN: Because you put it over.

MR. SAYLER: I am not suggesting bad faith but it is possible we will need to go beyond the 26th of August. I hope not. It may very well be possible that we would have to, depending upon how the plaintiffs respond to requests for documents that have come up during the course of depositions.

We have asked, as documents are identified during the course of depositions, to have the documents produced where they are relevant to the questioning and I do not have a response to any of those requests yet.

Mr. Scherer told me just before coming in here that he is prepared now to give me a response which will indicate if they are going to respond to the documents requests and when. I do not have it yet but that could --

THE COURT: Are you putting me on notice?

MR. SAYLER: I am just saying it is possible

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., et al.,

Plaintiffs,

-against-

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, et al.,

Defendants.

76 Civ. 2027 (MEL)

U. S. DISTRICT COURT
FILED
AUG 15 1977
S. D. OF N. Y.

MICROFILM
AUG 15 1977

ORDER

Upon consideration of State defendants' motion to dismiss the complaint insofar as it seeks monetary relief and to vacate this Court's order of August 2, 1976, and briefs and oral argument relating thereto, it is

ORDERED that State defendants' motion to dismiss the complaint insofar as it seeks monetary relief be and hereby is granted and, it being the intention of the court to vacate any prior orders of this court which awarded monetary relief in favor of the plaintiffs and against the state defendant; ~~and~~ it is further

ORDERED that this Court's order of August 2, 1976 insofar as it awarded monetary relief against the State defendant and all subsequent orders relating to monetary relief to be afforded to plaintiffs be and hereby are vacated;

ORDERED that plaintiffs promptly refund those funds paid to plaintiffs pursuant to this Court's order of August 2, 1976, and subsequent orders directing the provision of monetary relief. This refund is to be accomplished by means of adjustments in future Medicaid payments made to plaintiffs by local social services districts. The provisions of this order shall be stayed pending hearing and determination by the Court of Appeals of plaintiffs' appeal from this order.

Morris E. Lasker
U.S.D.J.

Dated: New York, New York
August 12, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., et al., :

Plaintiffs, : 76 Civ. 2027 (MEL)

-against- :

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, et al., : NOTICE OF MOTION

Defendants. :

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SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Jacob Imberman, Esq., sworn to August , 1977; the Order of this Court entered August 15, 1977; the proposed Amended Order annexed hereto; the Memorandum of this Court dated August 4, 1977; the Order of this Court entered November 9, 1976; the Order of this Court entered August 2, 1976; and upon all prior proceedings herein, the undersigned will move this Court at a Motion Term to be held before the Honorable Morris E. Lasker, United States District Judge, in Room 1903 of the United States Courthouse, 40 Centre Street, New York, New York, on the day of August, 1977, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an Order pursuant to Rule 59 of the Federal Rules of Civil Procedure, amending the Order of this Court entered August 15, 1977 in conformity with the proposed Amended Order annexed hereto, upon the ground that such amendment is necessary to preserve plaintiffs' rights to pursue its legal and equitable remedies in the State courts and would be in the interests of justice, and for such other and further relief as to the Court may seem proper.

Dated: New York, New York
August , 1977

PROSKAUER ROSE GOETZ & MENDELSOHN

By____________________________
A Member of the Firm
Attorneys for Plaintiffs
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New York, New York 10022
(212) 593-9000

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888 Sixteenth Street, N.W.
Washington, D.C. 20006

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - x

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., et al.,

Plaintiffs,

76 Civ. 2027 (MEL)

-against-

AFFIDAVIT

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, et al.,

Defendants.

- - - - - - - - - - - - - - - - - - - x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JACOB IMBERMAN, being duly sworn, deposes and says:

1. I am a member of the firm of Proskauer Rose Goetz & Mendelsohn, attorneys for the plaintiffs herein. I make this affidavit in support of plaintiffs' motion for an order amending this Court's Order entered August 15, 1977. A copy of plaintiffs' proposed Amended Order is annexed hereto as Exhibit A.

2. The amendment sought by plaintiffs consists of an additional decretal paragraph providing that the August 15th Order was not intended, and should not be construed, to prohibit or hinder plaintiffs from pursuing and obtaining any and all legal and equitable remedies in the State courts including, but not limited to, the right to seek and obtain both a preliminary and permanent injunction against recoupment by the State defendants of the funds paid to plaintiffs pursuant to this Court's Order of August 2, 1976 and subsequent Orders directing the provision of monetary relief. Without such an amendment, the State

defendants could argue that this Court's August 15th Order precludes a State court from enjoining such recoupment.

3. This Court has stated that its Memorandum dated August 4, 1977 (which vacated the Order of August 2nd and subsequent Orders insofar as they awarded monetary relief against the State defendants) was based solely on jurisdictional grounds and did not affect the plaintiffs' substantive rights to receive the moneys paid to them under the August 2nd Order (and subsequent Orders) for the period from January 1, 1976 through August 16, 1976 (the date of the Secretary's approvals of the State Plan amendments at issue). (See transcript of August 11, 1977 Court conference at 31-32, copies of which are annexed hereto as Exhibit B.) Moreover, in recognition of the fact "that the State acted in blatant disregard of the federal [pre-implementation approval] requirement" and that there is "no doubt the State acted in violation of law" (see August 4th Memorandum at 28, 29), this Court has suggested that plaintiffs are, and should be, free to pursue their claims for money judgments against the State defendants (including "the amounts involved in the August 2nd judgment") in the State courts. (See August 4th Memorandum at 27, 30.)

4. As presently worded, the August 15th Order requires "that plaintiffs promptly refund those funds paid to plaintiffs pursuant to this Court's Order of August 2, 1976, and subsequent orders directing the provision of monetary relief." (Third decretal paragraph). This Court has indicated that it included this decretal paragraph in the August 15th Order because the Court felt that it did not have the discretion to decline to order recoupment. Thus,

plaintiffs will be required to seek a money judgment in the State courts and, pending a State court's determination on the merits of plaintiff's claims, plaintiffs will be required to seek an injunction in the State courts against recoupment of the sums to which this Court found they are lawfully entitled and which have already been paid. However, a State court may be reluctant to issue such an injunction because to do so might appear to that court to be an injunction against enforcement, or a modification, of this Court's August 15th Order. Thus, plaintiffs seek an amendment to the August 15th Order which would make it clear that the Order was not intended to prohibit or hinder plaintiffs from pursuing and obtaining any and all legal and equitable remedies in the State courts, including an injunction against recoupment.

JACOB IMBERMAN

Sworn to before me this
day of August, 1977.

Notary Public

Served
~~Received~~ filed orig + 5 copies 9/13/77
Entered in Docket ✓
Entered in Diary For

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., MISERICORDIA HOSPITAL MEDICAL CENTER, BUFFALO GENERAL HOSPITAL, THE GENESEE HOSPITAL, and THE MOUNT SINAI HOSPITAL on behalf of themselves and all other nonprofit hospitals which are members of the HOSPITAL ASSOCIATION OF NEW YORK STATE, INC. and which are reimbursed for Medicaid services rendered to hospital patients,

Plaintiffs,

- against -

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, ROBERT P. WHALEN, as Commissioner of Health of the State of New York, PETER GOLDMARK, as Director of the Budget of the State of New York, HUGH L. CAREY, as Governor of the State of New York, and F. DAVID MATHEWS, as Secretary of the U.S. Department of Health, Education & Welfare,

Defendants.

76 Civ. 2027
(MEL)

NOTICE OF APPEAL

Notice is hereby given that the Hospital Association of New York State, Inc., Misericordia Hospital Medical Center, Buffalo General Hospital, The Genesee Hospital, and The Mount Sinai Hospital on behalf of themselves and all other nonprofit hospitals which are members of the Hospital Association of New York State, Inc. and which are reimbursed for Medicaid services rendered to hospital patients, plaintiffs above-named ("plaintiffs") hereby appeal to the United States Court of Appeals for the Second Circuit from the order entered August 15, 1977:

(1) granting the motion to dismiss the complaint made by defendants Toia, Whalen, Goldmark and Carey ("State defendants") insofar as the complaint seeks monetary relief;

(2) vacating the Court's order entered August 2, 1976 insofar as it awarded monetary relief against the State defendants and vacating all subsequent orders relating to monetary relief to be afforded to plaintiffs; and (3) directing the plaintiffs to promptly refund those funds paid to plaintiffs pursuant to the Court's order of August 2, 1976, and subsequent orders directing the provision of monetary relief, insofar as the order entered in this action on the 15th day of August, 1977 applies to the State defendants.

Dated: New York, New York
September 12, 1977

PROSKAUER ROSE GOETZ & MENDELSOHN

By: ______________________
A Member of the Firm
Attorneys for Plaintiffs
300 Park Avenue
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(212) 593-9000

TO:

ALAN MOLLER, ESQ.
Assistant Attorney General
Attorney for State Defendants
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JOHN M. O'CONNOR, ESQ.
United States Attorney's Office
Attorney for Defendant Mathews
1 St. Andrew's Plaza
New York, New York 10007

PETER NADEL, ESQ.
Rosenman Colin Freund Lewis & Cohen
Attorneys for New York City Health
and Hospitals Corporation
575 Madison Avenue
New York, New York 10022

Sir:

Please take notice that the within is a true copy of this day duly entered and filed herein in the office of the Clerk of ______

______

of New York

Dated, New York, 19

Yours, etc.,

PROSKAUER ROSE GOETZ & MENDELSOHN

Attorneys for

300 PARK AVENUE

NEW YORK, N. Y. 10022

To

Attorneys for

772

Sir:

Please take notice that an order of which the within is a true copy will be presented for settlement and signature herein to Mr. Justice

at *of*

this Court at

in the Borough of

City of New York,

on the *day of* , 19

at *o'clock in the* *noon.*

Dated, New York, 19

Yours, etc.,

PROSKAUER ROSE GOETZ & MENDELSOHN

Attorneys for

300 PARK AVENUE

NEW YORK, N. Y. 10022

To

Attorneys for

INDEX NUMBER ______ 197__

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., et al.

Plaintiffs,

-against-

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, et al.,

Defendants.

NOTICE OF APPEAL

PROSKAUER ROSE GOETZ & MENDELSOHN

Attorneys for Plaintiffs

300 PARK AVENUE
NEW YORK, N. Y. 10022
(212) 593-9000

All communications should be referred to Mr.

Due service of a copy of the within is hereby admitted.

Dated, New York

To

Attorneys for

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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HOSPITAL ASSOCIATION OF N.Y.S., :
INC., et al.,
:
Plaintiffs,
:
-against-
: 76 Civ. 2027
PHILIP L. TOIA, as Commissioner
of Social Services of the State of :
New York, et al.,
:
Defendants.
:
-------------------------------------- x

Before:

HON. MORRIS E. LASKER,
District Judge

New York, September 14, 1977
10:45 a.m.

APPEARANCES

PROSKAUER, ROSE, GOETZ & MENDELSOHN, Esqs.,
Attorneys for Plaintiff Toia,
By: JACOB IMBERMAN, Esq.,
STEVEN S. MILLER, Esq., of Counsel

ROSENMAN, COLIN, FREUND, LEWIS & COHEN, Esqs.,
Attorneys for PlaintiffNYC,
By: PETER NADEL, Esq.,
STEPHEN L. RATNER, Esq., of Counsel

COVINGTON & BURLING, Esqs.,
Attorneys for Defendant NYS,
By: CHARLES MILLER, Esq.,
ROBERT SAYLER, Esq., of Counsel

Mr. Miller?

MR. C.MILLER: Your Honor, there are a number of discovery matters, relating to both sides, that would be appropriate for discussion before your Honor if the case is going to go forward to trial.

THE COURT: Does that mean they would ordinarily be pending before the Magistrate and because he is on vacation you would like to discuss it or has he already decided?

MR. MILLER: As to those we would raise we have felt the ones through the Magistrate would more appropriately relate to going to your Honor.

THE COURT: We will have to take it one at a time.

Gentlemen, let's talk about the mootness question first.

Nothing in the world would make me happier for this case to be moot, believe me. I have wondered some extent -- well, let me go back. I agree that the question of its status is most unusual at the very least. In fact, I think that there is possibly a serious enough question of mootness that it would not be inappropriate for the defendants to move to dismiss on the grounds of mootness, although I don't know that I would grant such a motion, except for the purposes of having it determined by the Court of Appeals, to be perfectly frank. But the case is in a very, very odd posture. It is too bad we are all faced with this terribly puzzling situation and the last thing I would want to do would be to spend a few weeks on this trial either to conclude myself or have some appellate court conclude that I should never have acted in the first place.

May I ask what the status is of my ruling with regard to the 11th Amendment. By the way, I am also prepared to rule on your motion to amend the order there. I will rule on that right now.

MR.C.MILLER: If you will rule on that, your Honor, then I have a request about that which goes to the question, namely a stay pending appeal, which we don't question, but in view of the stay, I was going to ask your Honor to condition it on filing an appeal within some period of time.

MR. IMBERMAN: We filed a notice of appeal, your Honor, yesterday.

THE COURT: The reason that I asked about that is that, of course, if my ruling on the 11th Amendment is reversed, then this whole question of mootness is irrelevant.

MR. IMBERMAN: It disappears.

THE COURT: In my musings over the complications which this situation presents and the differing views presented persuasively by both sides as to, if not the moot status of the case, then, nevertheless the question of whether in the discretion of the Court it is worth trying the case, I had thought that possibly a motion to dismiss, a decision on the motion to dismiss might be made quickly and processed at the same time as the appeal from the 11th Amendment issue and we would then have a clean situation with which to deal one way or another, although I recognize that would mean it would put off the trial for at least a few months.

But with such gargantuanpropositions as we are dealing with here and the on-going relationship with the parties, which is significant, it seems to me, because you are always going to be doing business with each other, it is really a question not of whether the case is going to be tried in Septembe r or January, but of who has got the money when. And I would like to talk for a moment about that approach to the situation and about the merits or lack of merits to that situation.

I am inclined to believe that there are some issues which remain to be tried here but it seems to me that a course for all of us would be enormously clarified if these propositions went up to the Court of Appeals, as one of them is going there now anyway, and we not only would have a sense of direction but an entire frame of reference. Mr. Miller?

MR. C. MILLER:Your Honor, my initial reaction to what you say, I think is that your proposal or suggestion makes a great deal of sense. We are not, as you know --let me start this again. We do feel a trial of this case now on the present record would be dubious, for the reasons we have set forth in our letter. And if you would like us to set forth our position in a formal motion to permit you to take this up in a more formal way so as to permit a formal ruling if you decide to make one, we could certainly do that.

THE COURT: I'm not really so concerned about the formalities as I am about distilling the points I have been talking about.

MR. C.MILLER: I don't think you want to rule on a letter. I appreciate that. The one thing that gives me some pause is this. There is a second case pending in the State Court, filed on behalf of the same class of plaintiffs. I think in that case there are different named plaintiffs, which challenge particular portions of the 77 amendments to the methodology. There is a petition on behalf of HHC for leave to intervene as a party plaintiff in that case which raises broader issues concerning the 77 methodology. I am advised that there is also a new lawsuit filed by HHC in federal court before Judge Duffy and I have not seen those papers and I don't know the basis of that matter.

I was quite serious in my letter in saying that the one thing the state was interested in avoiding was trying the case two or three or more times.

THE COURT: I should think everybody would.

MR. C.MILLER: I can't imagine those cases actually going to trial before the Court of Appeals decides an appeal in this case, but they could move toward trial through the discovery process. This court has invested a good bit of time in this issue and has a considerable expertise in the issue..

If the case is going to be tried someplace and there is the HEW jurisdictional question pending, but for the moment assuming that that is not granted and the case is going to be tried some place, I think or we would think it makes some sense to try it before your Honor. Having said that, I do think, however, that your suggestionof clarifying the scope of the trial and the limits of the court's authority to rule and grant relief before going through a lengthy trial makes a good deal of sense. We would strongly support that because the parties are obviously far apart on that and it is going to be a constant burr in the saddle.

THE COURT: I want the plaintiffs to understand that I have no objection to trying this case, so to speak, and in deciding the case. I think it is a very interesting subject, I think it would be an interesting trial.

It is that kind of proposition although it takes a lot of time and energy,but that is one of the reasons I am glad to be a member of this court.

But what has distressed me about the situation is the confusion which is engendered primarily, I think, because of the peculiar situation which the 11th Amendment imposes in a federal court. But not necessarily only that. However, I think that that confusion could be very, very substantially ameliorated if we were to do something of the kind that we have suggested.

And then we would either have no trial at all, ofcourse, which I don't think is likely to be the case, frankly, or we would have a trial in which we all understood clearly and had an authority ruling of what we could or should be doing. Mr. Imberman?

MR. IMBERMAN: Your Honor, I have some grave doubts about the advisability of adjourning the trial and no one knows even if your Honor were to decide this thing immediately and if you would certify it --

THE COURT: I would either certify it or grant it,one or the other.

MR. IMBERMAN: How soon the Court of Appeals would act and whether we would be getting a trial. In the meantime, the hospitals are very clearly prejudiced as a result of the inadequate reimbursement which they are receiving, not only for this year but for the fact that because this year's reimbursement becomes the base year for two years down the road, they are prejudiced continuously and for a longer period of time in the future.

I might suggest one thing, your Honor, and I say this with all respect. I think a great deal of our problem might be ameliorated, if your Honor would decide the motion for summary judgment which is addressed only to the HEW.

THE COURT: Of course if I decide it in your favor, but it won't be if I deny it. I have not reached a final decision on those motions because as you know since the argument on those motions, I decided the argument on the 11th Amendment and I was away for a vacation which I hope you don't consider too long and I have been analyzing the other questions thrown at me in this matter since I got back. But before the arguments on the motions, I read all the briefs. We had a good discussion at the time on the arguments of the motions.

I have since conferred further with Jody here who read the briefs and Roger Goldman who had heard the briefs and it is not a desirable thing for the Judge to give his point of view with regard to pending motions because if I change my mind somebody is going to wonder. But I think it is important that I should do so now because after all we have to know what's likely to happen. I think that I am likely to deny both motions. I think I am more likely to deny the motion for summary judgment for the very reason that some motions for summary judgment are much more difficult to approve because they deal with facts. Therefore, I think this discussion today should proceed as if the motion for summary judgment and the motion to dismiss by HEW are denied.

I will say that we will try to get written decisions on those, however limited they may be in scope out as soon as possible.

Having said that, Mr. Imberman?

MR IMBERMAN: Of course if your Honor denies it on matters of fact that have to be decided, that would help us as far as a trial is concerned and I would know what facts you think are relevant. At the present time it is somewhat difficult to address that.

THE COURT: In view of that problem, I would suggest that if we do go to trial, and there is at least a 50-50 chance that we will, that the issues vis-a-vis HEW should be expected to be tried in the later part of the trial rather than in the first.

To this extent I agree with the philosophy perhaps, of Mr. Miller and maybe you do too, the questions of whether what the state did was justifiable, are quite different from the questions of whether what HEW did. In any event, even on your own argument, as I understand what you argue -- how can I put it -- that because what the state did wasn't satisfactory and because HEW approved it, HEW is, to oversimplify, tarred with something of the same brush.

Therefore it would seem logical to me that you would wantto show what the state did in any event to begin with. But that's a little premature. If we decide to go to trial, then we will talk about what the order of proof is going to be.

I take it then that you do not believe that the total enterprise or at least you believe your clients would not be benefitted by my proposal.

MR. IMBERMAN: Your Honor, my initial feeling is that we would not be benefitted and it of course would be a lot easier to decide that if we had some sort of framework which nobody can give us of a time reference.

THE COURT: You mean by the Court of Appeals?

MR. IMBERMAN: How soon you could do things.

THE COURT: I could decide the motion quickly.

MR. IMBERMAN: Of course my personal view is arguments in the case --

THE COURT: I think I would decide that motion in saying there are serious questions but there is enough of a proposition that could be argued in favor of mootness or at least in favor of -- well, the exercise of discretion not to take the case, that I would grant the motion to dismiss and state quite candidly I wish the Court of Appeals to review it. I mean what's the point of playing a game about it.

MR. C. MILLER: Your Honor, I would say this, from the point of view of the state defendants, we are quite anxious to have the appeal from your jurisdiction order processed and concluded as quickly as possible for the obvious reason.

THE COURT: I am too. I'm a little disappointed it hasn't been done before this.

MR. C. MILLER: Which is why I will raise the matter. As part of that of your Honor's idea would be to couple the two oppositions. We would be willing to support any effort to expedite an appeal that covered the issue of what you called mootness, as long as it also covered the issue of jurisdiction. I would like to have them both decided quickly. Obviously from the financial point of view, the state wants to have the jurisdiction order decided as quickly as possible.

MR. IMBERMAN: Your Honor, let me say this. This is much too serious a question for me to give you an answer right now. There are too many problems as far as HEW is concerned, my clients and I want to consider.

Your Honor, if you have time this afternoon, I think we can come back this afternoon.

THE COURT: Well, I would arrange it and I don't mean to say you shouldn't have it.

Mr. Miller is shaking his head. What's your problem?

MR. C. MILLER: When Mr. Pope called up first and asked me to come this afternoon, I asked if we could have witnesses back fifteen times. It may be that your cross examination of the state witness -- I am not suggesting that I am requiring it and I wouldn't want to preclude you from, if we later had a case against the state amplifying on whatever the witnesses have said, but certainly the parties can make use of whatever there was in the trial and at least be fresh in the mind or at least in the mind of the judge. Much as it would be to my own personal convenience to redeem this block of time for use in other things that I have to do and believe me I am very much concerned about my own calendar, I do feel that something, if it can be salvaged here -- I say salvaged, if we can get to work on something on the trial basis conscientiously we should do so.

So that I am going to make these rulings at the present time.

I will be prepared if the state defendants move to dismiss on the grounds of mootness to grant such a motion, expressing my views as to the questions that I think Mr. Imberman raises and I think he raises some serious ones, but to grant it. So that the question is, in my opinion, a close one in any event, my ruling can be appealed. I would instruct the parties upon my denial of such a motion to proceed to appeal on an expedited basis and to couple that processing of the appeal with my earlier ruling of the 11th Amendment.

I would defer the trial -- obviously -- the trial against the state, if there is to be any until the disposition of such an appeal to the Court of Appeals.

I would be prepared as rapidly as possible to rule formally on the pending motions of the plaintiff against HEW for summary judgment which will be denied and the motion of HEW against the state which will be denied and to do my best to specify what I consider to be the remaining factual issues or to call the parties together and discuss what we all agree are the remaining factual issues.

I decline to certify the proposed denial of HEW motion as such because I don't think the Court of Appeals would accept the certification for any reason. By that I mean they have shown a very narrow predisposition to accept Rule 1292(b) applications, but for other reasons which were implied in what I said here this morning as well.

I would therefore be prepared to go ahead to commence the trial against HEW, which I would hope would be a trial which would consume noticeably less time than what had been planned for the whole trial which is four or five weeks, commencing October 3rd provided that some of these criminal cases which are still on my docket fold as some of them are bound to, but so far I have nothing down for that day.

This obviates the necessity at the moment to actual ruling on the motion to limit the state -- limit the issues against the state. But I am prepared to rule on that so we don't have to let that linger forever.

I am prepared to rule in favor of the state to the following extent:

That is, that I decline pending jurisdiction of state issues to the extent -- I don't mean to fail the ruling -- that proof of them will be independent of proof introduced on federal questions with the exception that I understand Mr. Miller to agree that is independent and appropriately litigable of Section 2807 of the public health law.

To clarify what I mean, Mr. Imberman says in his brief that 95 percent of what he wishes to put before me will simply be application or asking for a ruling or what constitutes a ruling, a violation of federal law also constitutes a violation of state law. To the extent he is able to demonstrate that by putting it before me evidence on the federal questions, I am not at the end of trial saying I have enough evidence to rule on the state question but I refuse to do so.

On the other hand, I am persuaded that Mr. Miller's analysis has a great deal of merit. That is, that I doubt that the questions of state administrative law and questions of state executive law are going to be proven by the evidence applicable to federal questions alone. Oh, yes, I may supplement my -- or I do supplement my ruling to this extent. To the extent that you want to ask a question of somebody, did you or did you not follow the provisions which require a review by whatever board it is and to get that into the record, I will allow you to do that and I will be prepared to rule because that doesn't add to the burden or not. I hope I have made myself clear. I am not willing and I don't believe it is the court's obligation and I don't think United Mine Workers v. Gibbs makes it appropriate to add to the proof and that's what's controlling as far as I am concerned, the material that would relate to state court questions alone.

MR. C. MILLER: Your Honor, just to supplement or ask about what you said, it sounded like we would almost have to at the close of the plaintiff's case ask your Honor for a ruling on a motion for a directed

motion dated 8/19/77
rec. 9/6

notice that the within is a
entered and filed herein in the
Clerk of

York, 19
Yours, etc.,
ER ROSE GOETZ & MENDELSOHN
for
300 PARK AVENUE
NEW YORK, N.Y. 10022

for

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Yours, etc.,
UER ROSE GOETZ & MENDELSOHN
for
300 PARK AVENUE
NEW YORK, N.Y. 10022

for

SOUTHERN DISTRICT OF NEW YORK

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., et al.,

Plaintiffs,

-against-

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, et al.,

Defendants.

NOTICE OF MOTION AND AFFIDAVIT

PROSKAUER ROSE GOETZ & MENDELSOHN
Attorneys for Plaintiffs

300 PARK AVENUE
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All communications should be referred
to Mr.

Due service of a copy of the within
is hereby admitted.

Dated, New York

To

Attorneys for

Motion granted to extent of amending the Court's order of Aug 15, 1977 by adding the following paragraph:

Ordered that the Court's partial granting of the State Defendants' motion to dismiss shall not be construed to prevent the plaintiffs from asserting in any other court such legal rights as they may have in relation to the subject matter of this suit.

It is so ordered

Morris E. Lasker
U.S.D.J.

9/14/77

PLEASE DOCKET AND RETURN
TO CHAMBERS

Served

Received in Court 9/23/77

Entered in Docket

Entered in Diary For

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------------------------------------x

HOSPITAL ASSOCIATION OF NEW YORK
STATE, INC., et al.,

Plaintiffs,

- against -

PHILIP L. TOIA, as Commissioner of
Social Services of the State of
New York, et al.,

Defendants.

---------------------------------------x

76 Civ. 2027 (MEL)

STATE DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

State defendants move the Court for an order dismissing the complaint in its entirety. The basis for this motion is set forth in the accompanying Memorandum of Points and Authorities, and is pursuant to the comments of the Court at the chambers conference of September 14, 1977.

In the alternative, State defendants move for dismissal of the complaint except with respect to the issue of whether the approval by the Secretary of the Department of Health, Education, and Welfare of the 1976 state plan for inpatient hospital service reimbursement was deficient because of inadequate consideration or faulty approval procedures.

Alternative forms of order are attached.

Respectfully submitted,

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Attorneys for the State Defendants

September 23, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., et al.,

Plaintiffs,

v.

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, et al.,

Defendants.

76 Civ. 2027 (MEL)

STATE DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION TO DISMISS THE COMPLAINT

State defendants move to dismiss this action on the ground that in the present status of the case no meaningful relief can be granted by the Court in response to the complaint and that the record on which plaintiffs seek to proceed is both incomplete and outdated.

The rationale for this motion has been set forth in our letter to the Court dated September 3, 1977 (a copy of which is attached as Exhibit A), particularly Part II thereof, beginning at page 4, and was the subject of extended discussion at the chambers conference on September 14.

In brief, the dismissal now being sought derives from the Court's order on the Eleventh Amendment jurisdiction issue, which the Court has recognized as precluding the award of any retroactive relief. This order would preclude any relief to plaintiffs with respect to reimbursement for medical services provided prior to final disposition of the case. Since the complaint is confined to challenging certain provisions of the state's 1976 methodology for reimbursing hospital services and since that methodology underwent substantial revision in 1977, which revision affected the principal grounds upon which plaintiffs based their complaint, any determination as to the validity of the 1976 methodology would relate to a reimbursement method no longer being utilized by the state.

We have recognized that certain provisions of the 1976 methodology have been continued (subject to 1977 modifications) in the 1977 methodology, and since plaintiffs base their challenge on certain of these provisions, there is an argument that the present case is not technically moot. Plaintiffs might, for example, have chosen to modify their approach by seeking to update the record to take account of the 1977 changes and HEW's approval thereof. However, plaintiffs have declined to do so. To the contrary, their position is that the 1977 amendments are "totally irrelevant" to the issues in this litigation. (Letter of September 9, 1977, from Mr. Imberman, pp. 5-6, Exhibit B hereto). Accordingly, the record on which plaintiffs seek to proceed is confined solely to the 1976 HEW approval and the provisions of the methodology as they stood in 1976. Given that only prospective relief is permissible, this is far too limited and outdated a record on which to base a prospective determination.*/

Dismissal is particularly justified in light of the pendency of two other actions by members of the plaintiff class that seek to challenge the validity of the current methodology -- The Brooklyn Hospital, et al. v. Whalen, et al., Index No. 16058/77 (Sup. Ct., County of Kings, July 27, 1977), a class action on behalf of the entire plaintiff class in this case; and New York City Health and Hospitals Corporation v. Califano, et al., 77 Civ. 4483 (S.D.N.Y. Sept. 9, 1977). If the present case went forward, the state defendants would be in the position of litigating the validity of the current reimbursement methodology in three separate cases, a burden that is not warranted in light of the inadequacy of the record on which this case is presently premised.

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*/ Recently the state has adopted additional amendments to its methodology which will take effect as of January 1, 1978, assuming that HEW approves these changes. Unlike the 1977 changes, these modifications do not substantially alter the nature of the methodology. However, they will provide a further opportunity for HEW review and they do affect to some degree some of the provisions that plaintiffs have identified as supporting their challenge. The fact of these recent changes points up how outdated is the record on which plaintiffs wish to proceed.

Accordingly, this Court should decline to undertake trial of this case, which involves substantial issues of public importance that should not be tried on a piecemeal basis and that should be considered only on the basis of a full and current record. Cases supporting ths dismissal requested are cited in our letter of September 3 (Exhibit A) at page 6.

The foregoing motion is addressed to the complaint in its entirety, including the challenge to HEW's 1976 approval of the state's methodology. However, at the chambers conference on September 14 the Court indicated its inclination to go forward with the case to the limited extent of trying the issue, tendered by plaintiffs, as to whether HEW's approval was deficient because of inadequate consideration or faulty procedures. This issue had been presented in the summary judgment motion submitted on behalf of the class plaintiffs. The Court expressed the view that because the HEW approval process was likely to be repeated in the future, there might be a legitimate basis for entering a prospective order with respect to that process. See Transcript of chambers conference of September 14, pp. 20, 23, 27.

We respectfully suggest that, in the context of this case, the result would be, in essence, an advisory opinion. But even if the trial does proceed to this extent, it would be inappropriate for the Court to issue any declaration with respect to the validity of the HEW approval of the 1976 plan. Plaintiffs seek such an order essentially so that they may use it as the basis for a claim against the state defendants in a state forum. As we have previously shown and as the Court has agreed, this is an inappropriate basis for the granting of declaratory relief. If there is to be a trial concerning the adequacy of the HEW approval process, relief, if any, should be confined to orders, as appropriate, to HEW to improve that process.

Even if the Court should proceed with the limited issue outlined above, we nevertheless respectfully request that it enter an order of dismissal as to the balance of the issues in this case, in accordance with the Court's advice to the parties at the September 14 chambers conference.

Respectfully submitted,

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September 23, 1977

EXHIBIT A

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CABLE: COVLING

September 3, 1977

The Honorable Morris E. Lasker
United States District Court
Southern District of New York
United States Court House
Foley Square
New York, New York 10007

Re: Hospital Association of New York State, Inc., et al. v. Toia, et al. (76 Civ. 2027 (MEL))

Dear Judge Lasker:

This letter is submitted pursuant to your request at the August 11 chambers conference and to respond to letters dated August 24 and 25 from counsel for plaintiffs relating to the present scope and nature of the case. Plaintiffs in their comments at the conference and in their letters have intermixed two separate facets of this subject, and we think this may be the source of some confusion and uncertainty. We will endeavor in this letter to clarify the subject and to comment on what needs to be done if the case is to proceed now to trial.

The two separate matters that have commanded attention are (1) whether the Court may grant any retroactive relief -- retroactive in the sense that it relates to reimbursement for medical services prior to entry of the Court's order, and (2) whether the case presented in the Complaint and which the parties have been preparing to try has been rendered "moot" in light of the Court's disposition of the jurisdiction motion and the substantial amendment in 1977 of the state's payment methodology.

I.

Concerning retroactive relief, while plaintiffs contended to the contrary at the August 11 conference, they now apparently recognize that, assuming the correctness of the Court's disposition of the jurisdiction motion, the Court's power is limited to the entry of prospective relief that compels "compliance in the future with a substantive federal question determination." Plaintiffs' Aug. 24 letter, p. 2. As authoritatively decided in past cases, this principle means that a federal court confronted with the Eleventh Amendment immunity may not

(a) enter declaratory or injunctive relief which has either the purpose or direct or indirect effect of establishing rights or liabilities with respect to any period preceding entry of the order. Edelman v. Jordan, 415 U.S. 651 (1974); Rothstein v. Wyman, 467 F.2d 226, 236-37 (2d Cir. 1972), cert. denied, 411 U.S. 921, rehearing denied, 411 U.S. 988 (1973); Jordan v. Trainor, 551 F.2d 152 (7th Cir. 1977).

(b) declare rights or liabilities for the purpose, directly or indirectly, of establishing entitlement to retroactive relief in state courts or any other forum. Jordan v. Trainor, supra; Public Service Comm'n v. Wycoff, 344 U.S. 237 (1952); Local No. 2 v. Paramount Plastering, Inc., 310 F.2d 179 (9th Cir. 1962); Shanks v. NLRB, 260 F.2d 444 (7th Cir. 1958); General Electric v. Local 761 IUE, 395 F.2d 891 (6th Cir. 1968); OVC Gustavsson Contracting Co. v. Floete, 278 F.2d 912 (2d Cir. 1960). */

(c) enter prospective declaratory or injunctive relief solely to render an advisory opinion. Shanks v. NLRB, supra; General Electric v. Local 761 IUE, supra;

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*/ Powell v. McCormack, 395 U.S. 486 (1969), does not aid plaintiffs. There, contrary to plaintiffs' statement (Aug. 24 letter, p. 6), the Court held that declaratory relief would be appropriate in light of a pending claim in the same case for monetary relief. See pp. 498-500. The Court specifically declined to rule that the claim for monetary relief had to be pursued in the Court of Claims. Id. at 500.

Browning Debenture Holders Committee v. DASA Corp., 524 F.2d 811 (2d Cir. 1975); Diffenderfer v. Central Baptist Church, 404 U.S. 412 (1972).

Notwithstanding this apparently clear law, plaintiffs argue that the Court may grant declaratory relief as to the operation of the state's reimbursement methodology in the past because of the pendency of appeals from the 1976 rates and because it could lead to "significant administrative action." These points are not valid. As to the pendency of appeals, these are by definition efforts to secure exceptional treatment different from that prescribed in the methodology. Thus, an adjudication of the validity of the methodology would not reach the processing of appeals, which are hospital requests to determine rates by deviating from the prescribed methodology. Moreover, the pending appeals represent efforts by the hospitals to secure greater reimbursement from the state for past services. As was held by the Seventh Circuit Court in Jordan v. Trainor, supra at 155, on remand from Edelman v. Jordan, supra, the Eleventh Amendment precludes "the granting of any type of relief constituting entitlement to retroactive benefits claimed against the state." Accordingly, a declaratory order cannot be justified on the basis that it would operate on pending appeals for past rate periods. */

As to "significant administrative action," plaintiffs apparently refer to an HEW conformity hearing. This possibility does not validate otherwise retroactive declaratory relief. HEW conformity hearings relate only to existing plan provisions, and look only to the award of prospective relief (reduction or termination of federal funding) until aspects of the current plan found to violate federal law or current practices contrary to the approved plan are corrected. See 42 U.S.C. § 1396c. Since there

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*/ Many appeals from the 1976 rates have already been processed, others are being processed, and it is unlikely that a substantial number will remain undecided by the time of entry of an order in this case.

can be no HEW conformity hearing on a superseded plan, declaratory relief with respect to the 1976 plan cannot be premised on this ground. */

In sum, there is no basis, consistent with the Eleventh Amendment as construed authoritatively in Edelman v. Jordan, that this Court may award plaintiffs any relief as to any period prior to entry of an order, and in particular to the period when the 1976 methodology was in effect.

II.

On the separate question of whether the case should go forward as to the future, plaintiffs appear not to grasp our point. We recognize that certain provisions introduced into the plan in 1976 are continued in the 1977 (current) plan. Our point derives from the proposition that plaintiffs' claim is and must be based on the overall result produced by the state's reimbursement methodology -- not on any one aspect of the methodology by itself. The plaintiffs' complaint was based on this proposition as has been their approach to the case to date. Even where plaintiffs have focused their attack on a particular provision, such as the 100 percent ceilings, their ground has been that the particular provision precludes overall reasonable cost reimbursement.

Our point is that the changes in the methodology made by the 1977 amendments are so substantial as to make the record developed in this case to date too stale and

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*/ In Catholic Medical Center v. Rockefeller, 305 F. Supp. 1256, 1268 (E.D.N.Y. 1969), aff'd, 430 F.2d 1297 (2d Cir.), appeal dismissed, 400 U.S. 391 (1970), cited at page 5 of plaintiffs' August 24 letter, HEW informed the court that a conformity proceeding could result only in prospective termination of benefits, not retroactive damages, based on a current failure of the state to comply with its approved plan. Likewise in Connecticut Union of Welfare Employees v. White, 357 F. Supp. 1378 (D. Conn. 1973), the comments of the court, also cited at page 5 of the August 24 letter, were addressed to plan provisions currently in effect.

insufficient to test the validity of the methodology. Almost every aspect of the methodology attacked by plaintiffs has been affected by the 1977 changes. An entirely new grouping method has been adopted for use in application of the ceilings. The appeals provisions have been revised and appeal rights have been expanded. A new length-of-stay ceiling has been added and ceiling provisions relating to HHC have been deleted. The trending factor has been modified. Changes have also been made in accounting provisions, in audit procedures, in computation of patient days, in adjustments to provisional rates, and in the computation of rates for services. Also, there has been a new HEW consideration and approval, and this included reconsideration of the provision for limiting resident and intern salaries, the change in which was not approved by HEW.

Because these changes were so substantial, the validity of the current methodology cannot rationally be determined without considering them. HANYS apparently agrees, for it argued to HEW during the approval process that the 1977 methodology contained "numerous proposals for substantive revisions" that ought not be considered alone but rather in the context of their impact on the overall reimbursement plan. */

Plaintiffs' present position is apparently that the changes are not significant, and that certain elements of the methodology adopted in 1976 and continued in the current plan operate, notwithstanding the 1977 amendments, to preclude overall reasonable cost reimbursement. **/

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*/ Comments of HANYS on Proposed Amendments Effective April 1, 1977, to the New York State Title XIX Plan, page ii. HANYS' words were that the changes "ought to be examined in consideration of their interaction with the rest of the State Plan as presently applied and with the philosophy of prospective reasonable cost reimbursement."

**/ HHC argues that the Court should determine the validity of the 1976 methodology without regard to the 1977 changes because it intends to file suit to challenge the current (1977) methodology and anticipates success. Apart from

(Footnote continued)

Understandably, the Court has been reluctant to decide without a record the significance of the 1977 changes and their bearing on the remaining issues. The present record is of no help on this question, because it is confined to the 1976 HEW approval and to the operation of the methodology as it stood prior to the recent changes, including the impact of the 1976 changes on the hospitals. In our view, it would be an imposition on the Court to try this case on the present record only to learn that the 1977 changes so impacted the elements of the methodology attacked by plaintiffs as to leave the existing record outdated. It would also be an imposition on the state, particularly since one other suit has already been filed in state court on behalf of the same class of hospitals challenging the validity of the current methodology, and HHC has announced its intention shortly to commence a federal court suit challenging HEW's approval of the 1977 methodology. If the present suit goes forward, the state will be required to defend its 1977 methodology in three separate cases.

In addition, as a matter of discretion, a federal court should decline to undertake trial of a case, particularly one involving issues of large public importance, on the basis of an inadequate or stale record, or where such a trial would amount to piecemeal litigation of a controversy. Public Affairs Press v. Rickover, 369 U.S. 711 (1961); National Health Federation v. Weinberger, 518 F.2d 711 (7th Cir. 1975); Panama Processes S.A. v. Cities Service Co., 362 F. Supp. 735 (S.D.N.Y. 1973).

(Footnote continued)

the unduly speculative nature of this argument, it is inappropriate for this Court to render what is in effect an advisory opinion for the ostensible purpose of assisting another court in fashioning the relief it might consider in the event it finds for the plaintiff in a suit yet to be filed.

Notwithstanding the foregoing, if the Court decides, despite the stale record and the pendency of the other cases attacking the current methodology, to allow plaintiffs to try a case now, the state defendants are prepared to defend the case. In that eventuality, we would expect to offer evidence at trial of the 1977 changes to the plan and HEW's approval of them.

III.

If this case is to go forward, we respectfully urge the Court to decide as quickly as possible the two pending threshold motions that will bear significantly on the nature of the trial. The first is the federal defendant's motion to dismiss, which questions the reviewability of HEW's approval action. Needless to say, our comments in this letter are subject to the state's position that the federal motion is well taken and should be granted. The parties need to know at the earliest whether the HEW approval is to be litigated at the trial.

The second motion that should be decided is the state defendants' motion to limit issues, which raises the question whether certain state administrative and procedural law points are properly included in the case under the pendent jurisdiction doctrine. Since consideration of these issues, particularly the administrative law point, would likely involve a large body of evidence, it is requested that the motion also be decided as soon as possible.

There is no need to decide the plaintiffs' summary judgment motion, which is based principally on the claimed insufficiency of HEW's consideration of the state's plan amendments at the time of the 1976 approval. Apart from the grounds of opposition set forth in the pleadings of the state and federal defendants, since only the current methodology is subject to suit, the 1977 HEW approval is the operative approval (although we recognize that the 1976 consideration and approval by HEW may also be pertinent to the case). Plaintiffs may contend that the 1977 consideration and approval by HEW did not bear significantly on the aspects of the methodology they are attacking. The state defendants believe that the 1977 consideration and approval are material. Again, the Court cannot decide without knowing the facts, and it would be especially inappropriate to act on the summary judgment motions when all of the relevant or potentially relevant facts are not before the Court and have not been the subject of discovery. */

IV.

Concerning the nature of the evidence to be introduced at trial, the state defendants assume that the plaintiffs' case is twofold as described in correspondence from Mr. Imberman several months ago: (1) that HEW approval was insufficiently supported, and (2) that the state methodology is inherently unlawful because of certain provisions that necessarily preclude reasonable cost reimbursement. In the present posture of the case, the latter point must mean that reasonable cost reimbursement is precluded notwithstanding the 1977 changes.

The state defendants will contest plaintiffs' evidence on these points. Our evidence will show that the HEW approval was properly based and that nothing in the current plan precludes reasonable cost reimbursement. One aspect of our defense will consist of evidence, developed in part through discovery, that the hospitals have incurred greater expenses than necessary to provide the services for which they are being reimbursed and that the current methodology yields a reimbursement rate at

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*/ The summary judgment motion also presents a contention that the state did not comply with certain federal requirements concerning the Medical Advisory Committee. The state defendants' response, inter alia, shows that the federal regulations were satisfied by the role played by the Hospital Review and Planning Council. At best for plaintiffs this presents a fact question. Subsequent discovery has developed additional evidence bearing on this subject. Summary judgment on this ground would be wholly inappropriate.

least equal to the cost at which the hospitals can reasonably be expected to provide the services for which they are compensated.

Respectfully,

Charles Miller

Charles A. Miller
Counsel for the
State Defendants

mb

cc: Jacob Imberman, Esq.
Peter F. Nadel, Esq.
John M. O'Connor, Esq.
The Honorable Morris E. Lasker
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EXHIBIT B

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September 9, 1977

Honorable Morris E. Lasker
United States Courthouse
Room 1903
Foley Square
New York, New York 10007

Re: Hospital Association of New York State, Inc., et al. v. Toia, et al.
76 Civ. 2027 (MEL)

Dear Judge Lasker:

We write in reply to the letter dated September 3, 1977 by Charles A. Miller in which counsel for the State defendants argued that plaintiffs' claims are moot. Not only have the State defendants failed to rebut the basic arguments contained in our letter to the Court dated August 24, 1977, but they have also demonstrated that their sole interest is to delay the trial of this case and to prevent plaintiffs from seeking or obtaining relief in _any_ forum -- federal or state.

As your Honor has recognized, this is a case of great public importance and it is essential that the hospitals receive a hearing and determination of their claims as promptly as possible. Every day that passes without an adjudication of the validity of the methodology under which the hospitals are being reimbursed further jeopardizes the financial integrity of, and the quality of care provided by, the hospitals.

Before undertaking a point-by-point refutation of the State defendants' arguments, it is important that your Honor be apprised of the State defendants' conduct in a class action recently commenced in the New York State Supreme Court by two non-profit hospitals against various State defendants challenging certain 1977 amendments to the State Plan. The Brooklyn Hospital, et al. v. Robert P. Whalen, et al., Index No. 16058/77. Even as the State defendants argue that this Court lacks jurisdiction to hear plaintiffs' claims, they (represented by the same attorneys as appear for them here) have moved to dismiss plaintiffs' claims in the State court action on the grounds, among others, that the State court lacks subject matter jurisdiction, that HEW is an indispensable party and that the State Plan is unreviewable in the State court. In the alternative, the State defendants have asked the State court to stay the action pending the outcome of the case before your Honor. (A copy of the State defendants' motion papers in the State court action are annexed hereto.)

Thus, the State defendants' position is that plaintiffs are not entitled to be heard in any forum and that actions by State officials in promulgating and implementing Medicaid reimbursement regulations, and by HEW in approving such regulations, are completely immune from judicial scrutiny, regardless of whether the regulations provide reasonable cost reimbursement as required by federal and State law or whether the regulations were adopted in an arbitrary and capricious manner and in violation of various procedural requirements. However, it is inconceivable that Congress, in enacting legislation (the Medicaid Act) providing for the expenditure by the federal government of billions of dollars, intended that such sums could be disposed of according to the unchecked whims of appointed State and federal bureaucrats. It is equally inconceivable that, merely by periodically amending portions of the State Plan, the defendants can be permitted to keep "one step ahead" of plaintiffs, evade judicial review and thereby flout federal and State law.

Reduced to essentials, the State defendants contend that plaintiffs are not entitled to a judgment because: (1) any relief which this Court could award plaintiffs would be based upon past conduct of the defendants and (2) the 1977 amendments are so significant that they have changed the entire character of the State Plan. These arguments are at once irrelevant and incorrect.

As we demonstrated in our letter of August 24, 1977, this Court has the power to enter a declaratory judgment with respect to a violation of the Medicaid Act even if that violation has ended. Catholic Medical Center v. Rockefeller, 305 F.Supp. 1256, 1268 (E.D.N.Y. 1969), aff'd, 430 F.2d 1297 (2d Cir. 1970), appeal dismissed 400 U.S. 931 (1970). The State defendants have not even attempted to rebut this clear holding. Rather, the State defendants have advanced the novel proposition that the Eleventh Amendment prohibits the entry of declaratory or injunctive relief which is grounded upon past acts of the State (even if such acts are continuing) or which could possibly be the predicate for a judgment in another forum.

The State defendants have confused the grounds upon which equitable relief may be granted with the nature of such relief. It is well settled that the Eleventh Amendment does not bar the entry of declaratory or injunctive relief as long as that relief (as distinguished from the grounds for the relief) is prospective in nature. See cases cited at page 2 of our August 24th letter; see also Lewis v. Shulimson, 400 F.Supp. 807 (E.D. Mo. 1975), aff'd, 534 F.2d 794 (8th Cir. 1976), cert. denied, sub nom. Gourley v. Lewis, 97 S.Ct. 1570 (1977), reh. denied, 97 S.Ct. 2643 (1977), in which the Eighth Circuit affirmed an order requiring a state to notify Medicaid recipients of their possible entitlement to past benefits. The cases cited by the State defendants in paragraph (a) on page 2 of their September 3rd letter are not to the contrary. Edelman v. Jordan and Rothstein v. Wyman merely held that a federal court could not enter a money judgment against a state and Jordan v. Trainor merely held that a judgment which had the practical effect of awarding a money judgment against a state is improper.

In any event, as we demonstrated in our August 24th letter, it is clear that the declaratory and injunctive relief which your Honor concededly has the power to enter in this case would have significant prospective impact. This is because: (a) the majority of the 1976 amendments, as well as the overall "strategy" of the State Plan, continue in force at the present time; (b) the 1976 amendments as originally approved are currently being applied to the determination of the numerous administrative appeals from the 1976 reimbursement rates; and (c) the continued use of the "trending factor" means that the artificially low 1976 costs incurred by the hospitals as a result of the coercive effect of the challenged amendments will significantly lower the hospitals' reimbursement rates in future years.

To the extent that the State defendants respond at all to these points, their arguments are completely inadequate. Thus, they claim, in wholly conclusory fashion, that the 1977 amendments supersede the 1976 amendments. However, they admit that the record in this case is entirely barren with respect to the nature and scope of the 1977 amendments and they do not deny that the most significant of the 1976 amendments continue in force substantially unchanged. Nor do they address the fact that, notwithstanding the 1977 amendments, the reimbursement "strategy" of the State Plan remains the same, a circumstance which bars a finding of mootness. (See cases cited at page 4 of our August 24th letter.) With respect to the pending administrative appeals, the State defendants admit that the 1976 amendments are presently being applied, but they attempt to minimize the importance of the appeals procedure. However, this is in direct contradiction to the abundant deposition testimony of both the State and Federal witnesses that the appeals procedure is integral to the operation of the State Plan if the hospitals are to receive reasonable cost reimbursement.* It is significant that, with respect to the continued and compounded deleterious effect of the artificially low 1976 costs coerced by the operation of the challenged amendments, the State defendants' September 3rd letter is silent.

The State defendants' argument that the mere possibility that plaintiffs may ultimately secure a money judgment in the State courts precludes this Court from entering any relief is similarly without merit. As we noted in our August 24th letter, *Powell v. McCormack*, 395 U.S. 486, 496-500 (1969), held that it is appropriate to award a declaratory judgment even though a plaintiff may be required to pursue his claim for money damages in another forum. The State defendants' attempted rebuttal of this holding is based on a misreading of *Powell*; the Court there clearly concluded that the forum in which a money judgment is ultimately sought is irrelevant to the propriety of declaratory relief. *Id*. at 500.

The cases cited by the State defendants in paragraphs (b) and (c) on pages 2-3 of their September 3rd letter are inapposite. Of the entire group, only *Jordan v. Trainor* involves Eleventh Amendment issues and all are factually distinguishable from the instant case. Thus, in *Public Service Comm'n v. Wycoff*, an action was dismissed because it was not ripe for adjudication (not because it was moot); in *Local No. 2 v. Paramount Plastering, Inc.*, the Court declined to decide a claim that the state alone had standing to raise and over which the state courts had sole jurisdiction; and in *Shanks v. NLRB*, the Court dismissed a complaint because a prior action on the same transaction was pending in another court. The remaining cases cited by the State defendants all involve situations in which there was no possibility that any relief which the courts could award would have prospective effect. Thus, in *OVE Gustavsson*

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* See, e.g., deposition of Dr. Robert P. Whalen, Commissioner of Health, at 202, 247; deposition of William McCann, Assistant Commissioner of Health, at 235-37; deposition of Seymour Budoff, Associate Regional Commissioner of HEW, at 579. Copies of these pages are annexed hereto.

Contracting Co. v. Floete, the work which was the subject of the contract in question had already been performed by a third party; in General Electric v. Local 761 IUE, the contract at issue had expired; in Diffenderfer v. Central Baptist Church, the contested part of the statute in question had been repealed; and in Browning Debenture Holders Committee v. DASA Corp., the meeting sought to be enjoined had already been held. Nevertheless, in Browning, the Second Circuit recognized that:

> "There may (arguably) be cases when declaratory judgment, by itself, will have an enforcement effect upon future behavior. When the behavior complained of is of such a nature that it might predictably be repeated again . . . a prior declaratory judgment may serve the useful purpose of facilitating an injunction at a future date."
>
> 524 F.2d at 816.

Since the instant case is one which, by its very nature, is "capable of repetition, yet evading review" (due to the defendants' power to tamper with the State Plan), it is clearly one which the Second Circuit recognizes should not be deemed moot. (See also cases cited at page 7 of our August 24th letter.)

In any event, it is obvious that a judgment by this Court would have significant prospective effect. Thus, an injunction would prevent the State defendants from continuing to implement the challenged regulations either in setting reimbursement rates or in determining appeals from 1976 and future rates. In addition, a declaratory judgment would require HEW to commence a conformity hearing and to take remedial action against the State for non-compliance with the Medicaid Act. As we demonstrated in our August 24th letter, such remedial action would include the termination of future federal funding in order to cure past and present violations of the Medicaid Act. Significantly, the Federal defendant has not denied HEW's power or duty to take such action and the State defendants apparently admit that HEW may reduce or terminate future funding to remedy the State's non-compliance with federal requirements.

The State defendants' belated attempt to inject the 1977 amendments into this case should not be permitted by the Court. This case is confined solely to the legality of the promulgation, implementation and approval of the 1976 amendments, and the 1977 amendments are totally irrelevant to a determination of that issue.

This is because the majority of the 1976 amendments continue in force at the present time and the most significant of these 1976 amendments, both individually and collectively, prevent the hospitals from receiving reasonable cost reimbursement. Thus, the State defendants' argument that the 1977 amendments changed the entire character of the State Plan is both incorrect and irrelevant. Certain provisions of the challenged amendments which admittedly continue in force (e.g., the 100 percent ceilings) are so prejudicial that changes regarding other provisions of the State Plan could not possibly ameliorate their deleterious effects. In and of themselves they preclude reasonable cost reimbursement.

In any event, as the State defendants admit, the record is barren of any evidence relating to the 1977 amendments. Thus, it would be extremely unfair to the plaintiffs if defendants were allowed to introduce evidence at trial concerning the 1977 amendments without plaintiffs having had the opportunity to obtain discovery on this issue.

Finally, the State defendants' suggestion that your Honor render prompt decisions on the defendants' motions for judgment on the pleadings and to limit issues, but that you simultaneously ignore plaintiffs' motion for summary judgment, is preposterous. Stripped of rhetoric, the State defendants would have this Court hold that plaintiffs are not entitled to any adjudication of the propriety of HEW's approval of State Plan materia Neither the Eleventh Amendment nor principles of mootness require such a holding and it is inconceivable that Congress could have intended such a result either when it enacted the Medicaid Act or when it repealed the consent-to-suit requirement.

In sum, we submit that the State defendants' arguments are without merit and the trial of this action should proceed as scheduled.

Very truly yours,

Jacob Imberman

JI:km
Enclosures

cc: John M. O'Connor, Esq.
Peter Nadel, Esq.
Covington and Burling, Esqs.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-------------------------------------x

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., et al.,

Plaintiffs,

- against -

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, et al.,

Defendants.

-------------------------------------x

76 Civ. 2027 (MEL)

ORDER

Upon consideration of the state defendants' motion to dismiss the complaint, plaintiffs' response thereto, and the entire record herein, and after a conference with counsel on September 14, 1977, it is hereby

ORDERED that for the reasons set forth in the state defendants' Memorandum of Points and Authorities dated September 23, 1977, this action is dismissed.

Morris E. Lasker
United States District Judge

September , 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------------------------------------x

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., et al.,

Plaintiffs,

- against -

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, et al.,

Defendants.

---------------------------------------x

76 Civ. 2027 (MEL)

ORDER

Upon consideration of the state defendants' motion to dismiss the complaint, plaintiffs' response thereto, and the entire record herein, and after a conference with counsel on September 14, 1977, it is hereby

ORDERED that for the reasons set forth in the state defendants' Memorandum of Points and Authorities dated September 23, 1977, this action is dismissed except with respect to the issue of whether the approval by the Secretary of the Department of Health, Education, and Welfare of the 1976 state plan for inpatient hospital service reimbursement was deficient because of inadequate consideration or faulty approval procedures.

Morris E. Lasker
United States District Judge

September , 1977

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MOTION TO DISMISS THE COMPLAINT, MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF, and PROPOSED ORDERS were served by hand this 23d day of September, 1977, on the following:

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Assistant United States Attorney
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U.S. Courthouse Annex
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New York, New York 10007

Charles Miller

Charles A. Miller

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[illegible] 27 1977
S. D. OF N. Y.

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HOSPITAL ASSOCIATION OF NEW YORK :
STATE, INC., et al.,
:
Plaintiffs, 76 Civ. 2027 (MEL)
:
-against-
:
PHILIP L. TOIA, as Commissioner of
Social Services of the State of :
New York, et al.,
:
Defendants.
:
- - - - - - - - - - - - - - - - - - - -x

AMENDED ORDER

Upon consideration of State defendants' motion to dismiss the complaint insofar as it seeks monetary relief and to vacate this Court's order of August 2, 1976, and briefs and oral argument relating thereto, it is

ORDERED that State defendants' motion to dismiss the complaint insofar as it seeks monetary relief be and hereby is granted and, it being the intention of the court to vacate any prior orders of this court which awarded monetary relief in favor of the plaintiffs and against the State defendants; it is further

ORDERED that this Court's order of August 2, 1976, insofar as it awarded monetary relief against the State defendants and all subsequent orders relating to monetary relief to be afforded to plaintiffs be and hereby are vacated;

ORDERED that plaintiffs promptly refund those funds paid to plaintiffs pursuant to this Court's order of August 2, 1976, and subsequent orders directing the provision of monetary relief. This refund is to be accomplished by means of adjustments in future Medicaid payments made to plaintiffs by local social services districts. The provisions of this order shall be stayed pending hearing and determination by the Court of Appeals of plaintiffs' appeal from this order.

ORDERED that the Court's granting of the State defendants' motion to dismiss for lack of jurisdiction under the Eleventh Amendment to the United States Constitution shall not be construed to prevent plaintiffs from exercising in any other Court such legal rights as they may have in relation to the subject matter of this suit.

Morris E. Lasker
U.S.D.J.

Dated: New York, New York
Sept 15, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---x

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., et al., Plaintiffs, -against- PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, et al., Defendants.	:	76 Civ. 2027 (MEL)

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PLAINTIFFS' MEMORANDUM IN OPPOSITION TO STATE DEFENDANTS' MOTION TO DISMISS

The State defendants have moved to dismiss this action on the ground that, as a result of this Court's ruling on the Eleventh Amendment issue, no meaningful relief can be granted. It is the State defendants' contention that any decision in the present context of the case would be, "in essence, an advisory opinion." Defs.' Memo., p. 5.

The positions of the parties on this question are amply set forth in plaintiffs' letters to the Court of August 24 (attached hereto as "Exhibit 1") and September 29 (Defs.' Memo., Ex. B) and defendants' letter of September 3 (Defs.' Memo, Ex. A). Accordingly, in this memorandum we limit ourselves to highlighting the fundamental errors in defendants' argument.

Defendants argue that the 1977 amendments to the reimbursement methodology effected such substantial changes as to render this case stale. As we demonstrated in our letters, however, many of the illegal elements of the 1976 methodology were continued in 1977.* Moreover, defendants have yet to - and cannot - rebut the point that the 1976 reimbursement rate has a direct effect on 1978 rates regardless of the 1977 amendments. This is because 1976 will be the "base year" upon which the 1978 reimbursement rates will be calculated. By virtue of this fact alone, this case remains a live, justiciable controversy.

But even assuming that defendants were correct in their assertions about the scope of the 1977 amendments, it is well-established that a change in conduct by a defendant does not moot a challenge to his past practices. _E.g._, _DeFunis v. Odegaard_, 416 U.S. 312, 318 (1974). So long as there is the possibility of repetition of the challenged conduct, there remains a live controversy. _E.g._, _Local 74 v. N.L.R.B._, 341 U.S. 707, 715 (1951). A defendant is not permitted to use mootness in such situations to escape judicial review, while retaining the power to reinstate the challenged practice at some later time. _E.g._, _Roe v. Wade_, 410 U.S. 113, 125

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* Including the outpatient freeze, which is not formally incorporated in the State Plan. Public Health Law §2807(2)(d).

(1973). Thus, a defendant who raises the mootness issue bears the "heavy burden" of demonstrating "that 'there is no reasonable expectation that the wrong will be repeated.'" United States v. W. T. Grant Co., 345 U.S. 629, 633 (1953).

These principles are illustrated by two decisions involving facts analogous to those at bar. National Association of Greeting Card Publishers v. United States Postal Service, No. 75-1856 (D.C. Cir. December 28, 1976),* concerned substantive and procedural challenges to a series of temporary and permanent postal rate increases instituted by the Postal Service. The plaintiffs there presented detailed attacks on the rate-setting methodology that was used.

Among the rate increases in issue was a rate in effect only between September and December, 1975. That rate was superseded many months before the Court of Appeals reached its decision, and in its per curiam opinion the court sua sponte raised the question of whether that aspect of the appeal had been mooted. In holding that the case was not moot, the court found that the frequency of postal rate changes presented a perfect example of the "capable of repetition, yet evading review" exception to mootness.* The court also observed that the plaintiffs had a continuing interest in an adjudication of the legality of the September-December, 1975 rate, even if no other relief could be granted, because "the new permanent postal rates [were] based on a methodology significantly similar" to that used in 1975.

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* Copies of the Slip Opinion will be provided as soon as they are available.

National Foundation v. City of Fort Worth, 415 F.2d 41 (5th Cir. 1969), cert. denied, 396 U.S. 1040 (1970), involved a challenge to a local law which had been substantially amended by the city council before the appeal reached the Court of Appeals. The court rejected a contention that the case had been mooted by the amendments, noting that unless a decision was rendered the city council could subsequently have repealed the amendments or reenacted the objectionable provisions. 415 F.2d at 45. The court also noted that the persistence of certain of the original provisions of the law justified the continued prosecution of the case. Id.

The analogy between these two decisions and the instant case is patent. Although the defendants modified some of the regulations in 1977, (1) the basic methodology remains unchanged and (2) absent a court order clearly delineating the statutory requirements, nothing precludes a resumption of past illegal practices. Thus, under the principles of the cases above, plaintiffs' continuing interest in an adjudication of the lawfulness of the 1976 rates makes this case a live controversy.

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* See State defendants brief dated December 30, 1976, to the Court of Appeals in No. 76-6117, where, at page 4, reference is made to the annual revision of reimbursement rates.

On the other hand, defendants have not even arguably met their "heavy burden" of showing that this is not a case "capable of repetition." There are only bald assertions that the 1977 amendments are "substantial" and that the record is now "stale." Indeed, the record is devoid of any documentation by defendants which explains the nature and effect of the 1977 amendments or why a return to 1976 practices is not likely. Dismissal of the case under these circumstances would thus set up a situation of governmental conduct "evading review."

CONCLUSION

The motion to dismiss should be denied.

Dated: September 28, 1977

Respectfully submitted,

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Of Counsel:

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CABLE: ROPUT
TELEX: ITT 42117
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August 24, 1977

Honorable Morris E. Lasker
United States District Court
United States Courthouse
Room 1903
Foley Square
New York, New York 10007

Re: Hospital Association of New York State, Inc., et al. v. Toia, et al.
76 Civ. 2027 (MEL)

Dear Judge Lasker:

At the August 11th conference, your Honor asked us to write you and to set forth our views as to whether all or part of the case is moot and as to the relief which we believe you still have the right to grant. We believe it to be plain that this case is not moot and that your Honor has the power to grant declaratory and injunctive relief and that such relief will have a prospective effect. We shall demonstrate below that: (1) plaintiffs are entitled to declaratory and injunctive relief which will be meaningful because the State Plan amendments at issue continue in force in substantially the same form as originally enacted and because these very amendments are currently being applied by the State defendants with respect to numerous pending administrative appeal from 1976 reimbursement rates; (2) a declaration that the amendments challenged are invalid will require the federal defendant to commence a conformity proceeding to compel the State defendants to remedy their violations of the Medicaid Act if they are to retain the benefit of future federal funding; (3) the fact that plaintiffs may have to resort to another forum to obtain monetary relief does not preclude this Court from entering a declaratory judgment; and (4) a decision by your Honor that this entire case is moot might effectively preclude plaintiffs, and others similarly situated, from ever obtaining declaratory or injunctive relief in either the federal or the State courts, despite the fact that the wrongs committed by the defendants clearly have continuing effect and are capable of repetition.

1. It is undisputed that, under Edelman v. Jordan, 415 U.S. 651, 666 n.11 (1974), plaintiffs are entitled to "prospective declaratory and injunctive relief" against the State defendants.* Thus, the model of proper relief under the Eleventh Amendment is relief that compels "compliance in the future with a substantive federal-question determination". Id. at 668 Nor does the fact that the illegality of the State Plan amendments at issue results, in part, from past conduct of defendants constitute a bar to the relief sought by plaintiffs, since it is well-settled that the Eleventh Amendment permits prospective relief from past acts of state officials. See, e.g., Milliken v. Bradley, ___ U.S. ___ 97 S.Ct. 2749, 2761-62 (1977); Rochester v. White, 503 F.2d 263, 267 (3d Cir. 1974).

The State defendants' argument, as we understand it, is that, merely because the State promulgated (and HEW approved) a few amendments to the State Plan in 1977, this moots the entire case. Although the State defendants have repeatedly sought to convince this Court that the 1977 amendments constitute an entirely new and different State Plan, and that the "old" Plan has been terminated, this clearly is not so. The New York State Plan for Medical Assistan

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* At the August 11, 1977 Court conference, the following exchange occurred between the Court and the attorneys for the State defendants:

> "THE COURT: ...we do not have a quarrel, do we, that this Court does have authority to grant prospective relief if it is appropriate?
>
> MR. SAYLER: No, there is no quarrel on that, your Honor."

(August 11th Transcript at 4, a copy of which is annexed hereto)

("State Plan") is not a document which has an existence for one year and then has to be renewed or re-enacted. The provisions of th State Plan at issue in this litigation are on the one hand contained in attachment 4.19A to Transmittal No. 74-2 (as amended) and are als 10 N.Y.C.R.R. Part 86 of the New York State Regulations. Like any statute or set of regulations, once enacted it continues in existence until repealed or until it expires by its terms. The fact that the State may from time to time amend certain sections of the Plan does not mean that the entire Plan has been abrogated or that a "new Plan" has come into existence. In fact, the vast majority of the 1976 amendments (including those which plaintiffs found most objectionable) remain unchanged, thus leaving in force the fundamental approaches and strategies to reimbursement that were employed by the State defendants when this lawsuit began.

For example, provisions concerning the 100 percent ceiling on routine and ancillary costs (86.14(b)), the 75/125 percent corridor for determining average costs of a group (86.13(c)), the "trending factor" (86.21(k)) and appeals from the ceiling penalties (86.17(a)) remain virtually unchanged. While the State defendants have modified their method of grouping the hospitals and have permitted appeals from groupings, this does not change the applicabilit of the 100 percent ceiling provision.

In any event, as the State defendants have admitted, the record in this case is absolutely bare with respect to the effect, if any, of the 1977 amendments on the State Plan or whether HEW even considered whether the State Plan, as modified by the 1977 amendments, resulted in reasonable cost reimbursement to the hospitals. (August 11th transcript at 15, a copy of which is annexed hereto.) Moreover, your Honor has stated that, to the extent any changes in the State Plan resulting from the 1977 amendments may be used by the defendants as an affirmative defense in this case, the burden should be upon the defendants to offer such evidence at trial (August 11th transcript at 25-26, copies of which are annexed hereto Unless and until the defendants successfully carry this burden, it is clear that a finding by this Court that the amendments at issue were improperly approved by HEW (the subject of plaintiffs' summary judgment motion) or that the amendments violate the "reasonable cost requirement of the Medicaid Act, would mean that the pre-existing (1975) reimbursement methodology would have to be reinstated.

State Plans under various joint state-federal programs may not be insulated from judicial scrutiny merely because certain provisions of such plans are changed after the commencement of a lawsuit. When the "strategy" employed by the challenged plan remains in effect, the case is not moot and the federal courts have the obligation to decide the controversy. National Resources Defense Council, Inc. v. Environmental Protection Agency, 489 F.2d 390, 403-406 (5th Cir. 1974), rev'd on other grounds, 421 U.S. 60 (1975); United Airlines, Inc. v. CAB, 518 F.2d 256 (7th Cir. 1975). See also, Big Rivers Electric Corp. v. EPA, 523 F.2d 16 (6th Cir. 1975), cert. denied, 425 U.S. 934 (1976).

In addition to the fact that the vast majority of the challenged amendments, as well as the basic reimbursement "strategy" employed by those amendments, remain in full force and effect for the purpose of promulgating reimbursement rates for 1977 and future years, the 1976 amendments (as originally approved) are still being applied by the State defendants with respect to numerous pending administrative appeals from 1976 ceiling penalties. Since there are at least 25 such appeals pending at the present time,* it is clear that the validity of the 1976 amendments is an issue which is a live controversy.

Then too, the prospective reimbursement methodology, which is based on a trending of base-year costs forward to the rate year, perpetuates the deleterious effects of the 1976 reimbursement rates. Thus, for example, the hospitals' artificially low 1976 costs (reflecting cuts coerced by the illegal 1976 rates) will be used as the base-year costs for calculating 1978 reimburseme rates. See 10 N.Y.C.R.R. 86.21(k), which has not been changed by the 1977 amendments. Since the 1976 amendments thus will have continuing adverse effects on the hospitals in future years, it is clear that this case is not moot and that this Court's declaratory and injunctive powers could be used to fashion appropriate relief. See Shannon v. United States Department of Housing and Urban Development, 436 F.2d 809, 822 (3d Cir. 1970).

2. Moreover, assuming arguendo that, even after full consideration of the effect of the 1977 amendments and the propriety of their approval by HEW, this Court were to find that the 1976 amendments, as originally challenged, are no longer in effect, this

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* See letter dated August 3, 1977 from Robert N. Sayler, Esq. to the Honorable Martin D. Jacobs, a copy of which is annexed hereto

Court still retains the power to award declaratory relief without running afoul of the Eleventh Amendment or principles of mootness. Thus, in Catholic Medical Center v. Rockefeller, 305 F. Supp. 1256, 1268 (E.D.N.Y. 1969), aff'd, 430 F.2d 1297 (2d Cir. 1970), appeal dismissed, 400 U.S. 931 (1970), the District Court entered, and the Second Circuit affirmed, a declaration of the illegality of a statutory freeze of Medicaid reimbursement, despite the fact that the period during which the freeze had been in effect had expired. In short, it is the law of this Circuit that a District Court may enter a declaration with respect to a violation of the Medicaid Act even if that violation has ended.

The justification for this salutary rule of law is clear. Declaratory relief, such as the court awarded in Catholic Medical Center, would still have prospective effect because the Secretary of HEW has the power to commence a conformity hearing to determine whether or not a State Plan complies with the Medicaid Act (see 42 U.S.C. §1396c),* and to take appropriate remedial steps if he finds that it does not. In fact, the Secretary himself apparently argued in Catholic Medical Center that, among the remedies available to HEW to cure a finding of past violations by a State, is a termination of future federal funding. 305 F. Supp. at 1268-70.

Connecticut Union of Welfare Employees v. White, 357 F. Supp. 1378 (D. Conn. 1973), is directly on point. In that case, the plaintiffs challenged the Secretary's approval of certain aspects of Connecticut's Aid to Families with Dependent Children program. The Secretary moved to dismiss on the apparent ground that plaintiffs could not force the Secretary to commence a conformity hearing. Judge Newman denied the motion to dismiss, stating:

> "If it should develop that the Secretary's approval has been given in violation of constitutional or statutory standards, plaintiffs are at least entitled to a declaratory judgment establishing the invalidity of the approval. There is no reason to doubt that the Secretary, once alerted to such a situation, would explore with the state ways of modifying the caseworker assignment pattern to insure proper approval.

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* The Secretary also has the power to conduct an information discussion with State representatives. 45 C.F.R. §201.6.

> See 45 C.F.R. §201.6(c); Note, 72 Colum.L.Rev. 1404, 1436 (1972). Whether a court can compel exploration of such informal techniques need not now be decided. Nor is it necessary to anticipate the possibility of a remand to the Secretary for further acti[illegible]n conformity with the statute. The possibility of declaratory relief alone is sufficient to defeat the motion to dismiss." Id. at 1379.

Although Judge Newman found it unnecessary to compel the Secretary to commence a conformity hearing, it is apparent that a District Court would have the power to enter such an order. See Guerrero v. Garza, 418 F. Supp. 812 (W.D. Wis. 1976). Thus, the possibility that a declaratory judgment could result in remedial administrative action is in itself a type of prospective relief which renders this case viable. See also Gautreaux v. Romney, 448 F.2d 731, 736-37 (7th Cir. 1971).

3. As we have demonstrated above, the declaratory and injunctive relief which this Court concededly has the power to grant clearly would have significant prospective effect. Such relief: (1) would prevent the State from applying the challenged amendments to the promulgation of reimbursement rates for 1977 and future years and from applying the 1976 methodology to pending appeals from 1976 reimbursement rates; and (2) could result in significant administrative action.

In addition to the foregoing, as this Court has recognized plaintiffs would also have the right to seek an award of monetary damages in the State courts. However, the mere fact that a declaratory judgment by this Court may aid plaintiffs in securing a monetar judgment in another forum should not inhibit this Court from awardin declaratory relief. See Powell v. McCormack, 395 U.S. 486, 496-500 (1969), in which the Supreme Court found that it was appropriate to award a judgment declaring that Congress' action in refusing to seat Adam Clayton Powell was illegal, despite the fact that the Congressional term had ended and that Powell would be required to pursue his claim for back salary in another forum (the Court of Claims). The Supreme Court specifically held that these circumstanc did not render the case moot.

4. A finding by this Court that the entire case is moot merely because a few sections of the State Plan were modified in 1977 could mean that plaintiffs, and others similarly situated, would never be able to obtain declaratory or injunctive relief agains the implementation of State Plans which were improperly approved by HEW or which violated the Medicaid Act. This is because the defendants could always stay "one step ahead" of plaintiffs by enacting minor amendments every time there was a challenge to the State Plan. It is precisely to prevent such abuses that the federal courts consistently have held that cases which are "capable of repetition, yet evading review" should not be considered moot. Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911); Roe v. Wade, 410 U.S. 113, 125 (1973).

Finally, if plaintiffs are relegated to the State courts, then they may be unable to obtain a hearing on all of their claims. For example, it may be impossible to obtain State court jurisdiction over the Federal defendant, who may be a necessary and indispensable party to a determination of plaintiffs' claim that HEW's approvals of the amendments at issue were invalid (i.e., the subject of plaintiffs' summary judgment motion). Thus, a finding of mootness by this Court could mean that HEW is effectively insulated from judicial review of approvals of State Plans, no matter how arbitrary and capricious such approvals may be. Surely such a result is not contemplated by either the Eleventh Amendment or principles of mootness.

Moreover, if plaintiffs were thus precluded from challenging the validity of HEW's approvals of the challenged amendments, then this could severely prejudice plaintiffs' ability to obtain relief on their remaining claims. This is because the mere existence of these approvals might be given some weight by a State court in deciding whether the amendments violate the "reasonable cost requirement of the Medicaid Act.

For the foregoing reasons, plaintiffs contend that this Court's decision on the Eleventh Amendment issue does not render the case moot and that plaintiffs are entitled to a full trial on the merits.

Respectfully submitted,

Jacob Imberman (by [illegible])

Jacob Imberman

JI:km
Enclosures

cc: Peter Nadel, Esq.
John M. O'Connor, Esq.
Covington and Burling, Esqs.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., et al., :

Plaintiffs, : 76 Civ. 2027 (MEL)

-against- :

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, et al., :

Defendants. :

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AFFIDAVIT IN OPPOSITION TO THE STATE DEFENDANTS' MOTION TO DISMISS

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

PETER F. NADEL, being duly sworn, deposes and says:

1. I am a member of Rosenman Colin Freund Lewis and Cohen, attorneys for class Plaintiff New York City Health and Hospitals Corporation ("HHC"). I submit this affidavit and the accompanying Memorandum of Law in opposition to the State Defendants' motion to dismiss the complaint, made September 23, 1977.

2. I annex hereto as Exhibit A the papers of the State Defendants in support of their motion to dismiss in The Brooklyn Hospital, et al. v. Robert P. Whalen, et al., Index No. 16058/77 (Sup. Ct. Kings Co.). These papers are referred to in Exhibit B (p. 2) to the State Defendants' Memorandum of Points and Authorities in support of the present motion, but are not included therein.

3. HHC is a class member in the aforesaid action and has moved to intervene therein. The State Defendants have opposed HHC's motion to intervene.

4. In addition, on September 9, 1977, HHC commenced an action in this Court challenging the validity of the approval by the United States Department of Health, Education and Welfare, on or about March 31, 1977, of certain amendments to the New York State Plan for Medical Assistance (New York City Health and Hospitals Corporation v. Joseph A. Califano, Jr., et al., 77 Civ. 4483 (KTD)).

5. For the reasons set forth in HHC's accompanying Memorandum, the State Defendants' present motion should be denied in all respects.

Peter F Nadel

Peter F. Nadel

Sworn to before me this

28th day of September, 1977

Notary Public

MARC ROWIN
NOTARY PUBLIC, State of New York
No. 31-4513336
Qualified in New York County
Commission Expires March 30, 1977

EXHIBIT A

9/1/77 8/30
Entered in Docket ✓
Entered in Diary For ✓

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

THE BROOKLYN HOSPITAL and CHAMPLAIN VALLEY PHYSICIANS HOSPITAL MEDICAL CENTER, on behalf of themselves and all other non-profit hospitals located in the State of New York, similarly situated,

Plaintiffs,

- against -

ROBERT P. WHALEN, M.D., as Commissioner of Health of the State of New York, CARMEN SHANG, as Acting Commissioner of Social Services of the State of New York, PHILIP L. TOIA, as Director of the Budget of the State of New York, and HUGH L. CAREY, as Governor of the State of New York,

Defendants.

Index No. 16058/77

NOTICE OF MOTION TO DISMISS COMPLAINT

Sirs:

Please Take Notice, that upon the affidavit of PATRICIA A. BARALD, sworn to August 30, 1977, and upon Defendants' Memorandum of Law in Support of Motion to Dismiss and the summons and complaint heretofore served herein, the defendants will move this Court at Special Term Part I of this Court, to be held at the court house thereof, located at 360 Adams Street, Brooklyn, New York 11201, on September 16, 1977, at 9:30 A.M., or as soon thereafter as counsel can be heard, for an order pursuant to CPLR 3211:

1. Dismissing the complaint on the ground that the court does not have jurisdiction of the subject matter of the

EXHIBIT A

causes of action set forth therein.

2. Dismissing the complaint on the ground that the determination whether a federally approved State Medicaid Plan provides for reasonable cost reimbursement is not subject to judicial review.

3. Dismissing the complaint on the ground that the Secretary of the United States Department of Health, Education, and Welfare, a person who is an indispensable party defendant to this action, has not been joined herein, and that the court should not proceed in his absence.

4. Dismissing the complaint on the ground that plaintiffs failure to exhaust available administrative remedies bars this action.

5. Dismissing the complaint or in the alternative staying this action on the ground that there is another action pending between the same parties on related causes of action in the Federal District Court for the Southern District of New York.

6. Granting such other and further relief as may seem just and proper to the Court, plus the costs of this motion.

Demand is made that the answering affidavits and other supporting papers be served at least five days before the hearing date.

LOUIS J. LEFKOWITZ
Attorney General of the State of
New York
Two World Trade Center
New York, New York 10047

Patricia A. Barald

CHARLES A. MILLER
ROBERT N. SAYLER
PATRICIA A. BARALD
Special Assistant Attorneys General
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 452-6290

Attorneys for Defendants

Dated: August 30, 1977

TO: Proskauer Rose Goetz & Mendelsohn
Attorneys for Plaintiffs
300 Park Avenue
New York, New York 10022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Served
Received 9/1/77
Entered in Docket ✓
Entered in Diary For

THE BROOKLYN HOSPITAL and CHAMPLAIN VALLEY PHYSICIANS HOSPITAL MEDICAL CENTER, on behalf of themselves and all other non-profit hospitals located in the State of New York, similarly situated,

Plaintiffs,

- against -

ROBERT P. WHALEN, M.D., as Commissioner of Health of the State of New York, CARMEN SHANG, as Acting Commissioner of Social Services of the State of New York, PHILIP L. TOIA, as Director of the Budget of the State of New York, and HUGH L. CAREY, as Governor of the State of New York,

Defendants.

Index No. 16058/

NOTE OF ISSUE

NOTE OF ISSUE

1. Attorneys in support of motion:

Louis J. Lefkowitz
Attorney General of the State
of New York
Two World Trade Center
New York, New York 10047
(212) 488-3391

Charles A. Miller
Robert N. Sayler
Patricia A. Barald
Special Assistant Attorney General
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 452-6362

Attorneys for Defendants

2. Attorneys in opposition to motion:

Proskauer Rose Goetz & Mendelsohn
300 Park Avenue
New York, New York 10022
(212) 593-9000

Attorneys for Plaintiffs

3. Nature and Object of Motion:

This is a motion Pursuant to CPLR 3211 to dismiss the complaint in the aforecaptioned action on the following grounds: (1) that this Court lacks subject matter jurisdiction of the action; (2) that the State's reimbursement plan is not subject to judicial review; (3) that Plaintiffs have failed to join an indispensible party defendant; and (4) that Plaintiffs have failed to exhaust available administrative remedies. Defendants also request that this Court dismiss or in the alternative stay this action on the ground that there is presently pending in the Federal District Court for the Southern District of New York a related action between the same parties.

4. Papers in Support of This Motion

The papers in support of this Motion filed herewith are the Notice of Motion to Dismiss, the affidavit of Patricia A. Barald sworn to August 30, 1977, and accompanying attachments, Defendants' Memorandum of Law in Support of Its Motion to Dismiss, and the summons and complaint and Stipulation of the Parties of August 10, 1977, heretofore served herein.

5. This Motion is returnable at Special Term, Part I of this Court, 360 Adams Street, Brooklyn, New York 11201, on September 16, 1977, at 9:30 a.m., or as soon thereafter as counsel can be heard.

Note of Issue Filed by:

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York

Patricia A. Barald

By: Charles A. Miller
Robert N. Sayler
Patricia A. Barald
Special Assistant Attorney
General
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 452-6362

Attorneys for Defendants

To: Proskauer Rose Goetz &
Mendelsohn
300 Park Avenue
New York, New York 10022

Index No. 16058/77

CERTIFICATE OF SERVICE

I hereby certify that I have this 30th day of August, 1977, caused copies of the foregoing Notice of Motion to Dismiss, Affidavit of Patricia A. Barald in Support of Motion to Dismiss, and Defendants' Memorandum in Support of Motion to Dismiss to be served by first class mail to the following:

Proskauer Rose Goetz & Mendelsohn
300 Park Avenue
New York, New York 10022

Patricia A. Barald
PATRICIA A. BARALD

Washington, D.C.) SS:

Subscribed and sworn to before me this 30th day of August, 1977.

Notary Public

My Commission Expires: [illegible]

SUPREME COURT OF
THE STATE OF NEW YORK

COUNTY OF KINGS

- - -

INDEX NO. 16058/77

- - -

THE BROOKLYN HOSPITAL,
_et_ _al_.,

Plaintiffs,

- against -

ROBERT P. WHALEN, M.D.
As Commissioner of
Health of the State of
New York, _et_ _al_.,

Defendants.

- - -

NOTE OF ISSUE

- - -

Louis J. Lefkowitz
Attorney General of
the State of New York
Charles A. Miller
Robert N. Sayler
Patricia A. Barals

Special Assistant
Attorneys General

COVINGTON & BURLING

[illegible]
Filed 9/1/77 jm 8/30
Entered in Docket ✓
Entered in Clerk Fee

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

THE BROOKLYN HOSPITAL and CHAMPLAIN VALLEY PHYSICIANS HOSPITAL MEDICAL CENTER, on behalf of themselves and all other non-profit hospitals located in the State of New York, similarly situated,

Plaintiffs,

- against -

ROBERT P. WHALEN, M.D., as Commissioner of Health of the State of New York, CARMEN SHANG, as Acting Commissioner of Social Services of the State of New York, PHILIP L. TOIA, as Director of the Budget of the State of New York, and HUGH L. CAREY, as Governor of the State of New York,

Defendants.

Index No. 16058/77

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS CAUSE OF ACTION

WASHINGTON, D.C.) SS:

PATRICIA A. BARALD, being duly sworn, deposes and says:

1. I am associated with the law firm of Covington & Burling, Washington, D.C. I am a Special Assistant Attorney General of the State of New York and attorney for the defendants in the above-entitled action. I am fully familiar with all the facts and circumstances heretofore in this action.

2. The above-entitled action was brought for declaratory, injunctive and monetary relief seeking to invalidate certain 1977 amendments to the New York State Medical Assistance Plan ("New York State Plan") promulgated under Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq., ("Medicaid Act") and retroactive recomputation of Medicaid rates that would reimburse plaintiffs at a higher rate for providing services to Medicaid patients than is now allowed under the 1977 State Plan. (Complaint, p. 28).

3. The above-entitled action was commenced by the service of a summons and complaint, copies of which are attached hereto, upon the defendants on the 27th day of July, 1977.

4. The defendants have not served an answer in the above-entitled action and the time in which to do so, which has been extended according to Stipulation of the Parties of August 10, 1977 (copy attached hereto), has not elapsed.

5. This action against four named state officials in their representative capacities seeks monetary relief from the State and is a suit against the State of New York. The State may not be sued without its consent and it has not consented to be sued in this Court.

Therefore, this Court lacks subject matter jurisdiction over this action. Claims for monetary relief against the State must be brought in the state Court of Claims.

6. The federal Medicaid Act establishes a program of cooperative federalism by which the State develops methods and standards for reimbursing providers of Medicaid services, which are reviewed by the Secretary of the Department of Health, Education and Welfare ("HEW") for compliance with federal standards.

7. If the Secretary approves the New York State Plan, the federal government provides one-half of the funding of New York's Medicaid program. The other half of the funding is provided by the State and local governments in equal shares.

8. Section 1396a(a)(13)(D) and 1396b of the Medicaid Act provide that the Secretary of HEW shall review a State Plan to determine if it provides for payment of the reasonable cost of in-patient hospital services in accordance with federal standards. If he determines that federal standards are met, he must approve the State Plan.

9. The 1977 New York State Title XIX Plan, which plaintiffs challenge in this action, was reviewed

and approved by the Secretary of HEW on March 31, 1977. This approval was conditioned on the State's implementing several changes in the Plan by May 1, 1977. On April 29, 1977, the Secretary of HEW acknowledged that all the conditions had been met, and finally approved the 1977 State Plan.

10. In order to continue to receive federal funding for its Medicaid program, the State of New York must reimburse providers of Medicaid services according to the formula contained in its State Plan as approved by the Secretary on April 29, 1977, until a new plan has been submitted to and approved by the Secretary.

11. Congress, in committing review of Title XIX State Plans to the Secretary of HEW, made no provision for judicial review of the plans at the request of a provider of Medicaid services.

12. Whether the 1977 New York State Plan provides for reasonable cost reimbursement in accordance with federal law requires determination of numerous technical and complex economic questions, including but not limited to: the methods of hospital cost-accounting, allowability of reported costs for the purposes of reimbursement for services rendered to indigent patients, the state-of-the-art in grouping hospitals for the purpose of peer comparisons,

the present level of efficiency in hospitals, the degree of unnecessary hospital services or superfluous ancillary services rendered to hospital patients, the economic impact of reimbursement methodologies on hospitals, the processes of forecasting inflation, and the degree to which hospitals facing possible cost disallowances may contain costs, or increase efficiency, so as to stay within the cost ceilings.

13. Analysis of these issues, which has been committed to the expertise of the Secretary of HEW, would place an inordinate and unjustified burden on this Court.

14. The Secretary of HEW has not been joined by plaintiffs as a party defendant in this action.

15. Since the Secretary of HEW has been charged by Congress with the responsibility of approving the New York State Plan, and providing federal funding in accordance with his determination, he is an indispensable party to this lawsuit.

16. Medicaid expenditures for New York State for 1975-1976 totalled $2.8 billion, and expenditures have risen since that time. One-half of that amount is provided by the federal government.

17. A determination by this Court invalidating the approved 1977 New York State Plan, and requiring payment according to any other methodology, would necessarily have major adverse financial consequences for the federal

government. The presence of the Secretary of HEW is necessary to protect the interests of the federal government.

18. Since the State of New York may reimburse providers of Medicaid services only in accordance with its approved State Plan, the presence of the Secretary of HEW as a defendant in this action is also required to protect the interest of the State of New York.

19. Plaintiffs have failed to exhaust available administrative remedies before commencing this action.

20. The regulations challenged by plaintiffs, as contained in the New York State Plan and 10 N.Y.C.R.R. Part 86, expressly provide in Sections 86-1.16 and 86-1.17 that a Medicaid provider which feels that its reimbursement rate is inadequate for any of the enumerated reasons may appeal to the Commissioner of Health for review and revision of its rate.

21. On information and belief, neither of the named plaintiffs has availed itself of this appeal procedure nor has either pursued the appeal procedure to completion for the rate period beginning April 1, 1977.

22. On information and belief, the two named plaintiffs in this action are members of the Hospital Association of New York State, Inc. ("HANYS").

23. On May 5, 1976, HANYS commenced an action, 76 Civ. 2027 (MEL), in the Federal District Court for the Southern District of New York, against the same four state officials who are defendants in this action, and on behalf of the same class that the named plaintiffs purport to represent in this action. (Complaint attached hereto). The Secretary of HEW was also a named defendant in that action.

24. In that action, HANYS challenged the promulgation and implementation of the 1976 State Plan, 10 N.Y.C.R.R. Part 86, on grounds closely related to those that are alleged in this action: that the 1976 methodology violated plaintiffs' state and federal statutory and constitutional rights in that it failed to provide the reasonable cost of providing in-patient Medicaid services, and that it was improperly promulgated under state and federal law.

25. While HANYS has not amended its complaint in that action to challenge the 1977 State Plan, its counsel has stated that it intends to challenge all those aspects of the 1977 State Plan that originated in 1976 and remain in the State Plan (see letter of August 24, 1977, from Jacob Imberman, attorney for HANYS, to Judge Lasker).

26. Pending resolution of that lawsuit, the issues raised by plaintiffs in this action should not be determined by this Court.

27. No previous application for the relief herein prayed for has been made.

WHEREFORE, deponent respectfully asks for a judgment dismissing the complaint in the above-entitled action, or in the alternative for a stay of this action pending the outcome of the federal court suit identified above.

Patricia A. Barald

Patricia A. Barald
Special Assistant Attorney General
Covington & Burling
888 Sixteenth Street, N. W.
Washington, D. C. 20036
(202) 452-6362

Washington, D.C.) ss:

Subscribed and sworn to before me this 30th day of August, 1977.

Notary Public

My Commission expires: [illegible]

Served

Received 9/1/77 whn 8/30

Entered in Docket [illegible]

Entered in Diary For

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index No. 16058/77

THE BROOKLYN HOSPITAL and CHAMPLAIN VALLEY PHYSICIANS HOSPITAL MEDICAL CENTER, on behalf of themselves and all other non-profit hospitals located in the State of New York, similarly situated,

Plaintiffs,

- against -

ROBERT P. WHALEN, M.D., as Commissioner of Health of the State of New York, CARMEN SHANG, as Acting Commissioner of Social Services of the State of New York, PHILIP L. TOIA, as Director of the Budget of the State of New York, and HUGH L. CAREY, as Governor of the State of New York,

Defendants.

DEFENDANTS' MEMORANDU
OF LAW IN SUPPORT OF
THEIR MOTION TO DISMI
THIS ACTION PURSUANT
TO CPLR § 3211

PRELIMINARY STATEMENT

This action was commenced by plaintiffs, two non-profit voluntary hospitals purporting to represent all the non-profit voluntary and public hospitals in the State of New York, against four state officials in their representative capacities, seeking declaratory and injunctive relief against implementation of certain portions of the State's Medicaid program.

Under the Medicaid Act, Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq., providers of medical services are reimbursed by local, state and federal governments for services rendered to eligible patients. The states administer the program pursuant to the statute and to regulations promulgated by the Department of Health, Education, and Welfare ("HEW"). Federal law requires that certain aspects of a state's Medicaid program be embodied in its "State Plan," which must be approved by the Secretary of HEW.

Since January 1, 1970, New York State has reimbursed hospitals for in-patient services at rates calculated according to a prospective reimbursement methodology. This methodology is part of the State Plan approved by HEW and is based upon predicted costs rather than a retrospective formula. It is also contained in Part 86 of Chapter 10 of the New York Code of Rules and Regulations ("N.Y.C.R.R.").

In 1976 the State decided, in the face of rapidly increasing Medicaid costs, to reevaluate its in-patient reimbursement methodology. It promulgated a revised formula for computing reimbursement rates that was approved by the Secretary of HEW on August 16, 1976.

In 1977 the State decided to further revise its reimbursement methodology. On March 31, 1977, HEW approved the 1977 State Plan as amended, conditioned on certain changes to be made by the state. On April 29, 1977, HEW acknowledged that the State had satisfied the conditions for approval and that the approval was fully effective.

The HEW procedure for approving state plans for Medicaid reimbursement is informal. However, both in 1976 and in 1977 prior to approval of the state's plan amendments, HEW consulted with and received submissions from the Hospital Association of New York State, Inc. ("HANYS"), an association of most of the voluntary and public hospitals in New York State, of which plaintiffs in this suit are members.

By a lawsuit filed in the Federal District Court for the Southern District of New York on May 5, 1976, and currently pending before Judge Lasker (76 Civ. 2027(MEL)), HANYS, on behalf of all the non-profit voluntary and public hospitals of New York, has challenged the state's 1976 reimbursement methodology on various grounds, including the alleged failure to provide "reasonable cost" reimbursement as required by the federal Medicaid statute. Although not set forth in the complaint, plaintiffs in that action have stated that they are also challenging many aspects of the 1977 methodology that were first introduced in 1976 (See letter of August 24, 1977 from Jacob Imberman, attorney for HANYS to Judge Lasker, copy attached hereto).

In the instant action, the two named plaintiffs, allegedly as representatives of the same class represented by HANYS in the federal court suit, also seek declaratory and injunctive relief against the state's 1977 Medicaid rate reimbursement methodology, principally on the ground that it does not provide "reasonable cost" reimbursement as required by the federal Medicaid statute. Plaintiffs are in fact seeking monetary damages from the State, for they have labeled this a contract action against the State and they seek an order requiring a retrospective recomputation of the Medicaid rate. (Complaint p. 28). While plaintiffs in this action have challenged somewhat different aspects of the 1977 methodology than those provisions apparently challenged in the pending federal action, the primary allegation is that the methodology as a whole fails to provide reimbursement to hospitals for reasonable costs of providing in-patient Medicaid services. (Complaint ¶ 1).

ARGUMENT

Four separate grounds require dismissal of the complaint in this action:

(1) Lack of subject matter jurisdiction;

(2) Non-reviewability of the state's reimbursement plan;

(3) Failure to join HEW, a necessary party without whom the action cannot continue; and

(4) Failure to exhaust available administrative remedies.

While each ground individually would sustain the motion to dismiss, collectively they leave no doubt that this action may not be maintained in this Court.

In addition, even if the action is not dismissed, it should be stayed pending the outcome of the related case now pending in the federal court.

A. This Court Lacks Subject Matter Jurisdiction Over This Action

Although plaintiffs have labeled this an action for declaratory and injunctive relief against four named state officials, it is in essence a suit to recover greater monetary reimbursement for in-patient services that have been provided and will be provided to Medicaid patients than is currently allowed under the 1977 New York State Plan. Since an action brought against state officials in their representative capacities is in effect a suit against the state, *Ross* v. *Barbaro*, 304 N.Y.S.2d 941, 61 Misc.2d 147 (1969); *New York State Thruway Authority* v. *Hurd*, 29 A.D.2d 157, 286 N.Y.S.2d 436 (1968); *Psaty* v. *Duryea*, 306 N.Y. 413, 118 N.E.2d. 584 (1954), this is in effect a suit for monetary damages, both retrospective and prospective, against the State of New York. Such actions against the State are cognizable, if at all, only in the Court of Claims. The New York State Constitution in Article III, § 19, and Article VI, §§ 9, 18, provides that private claims against the state may be brought only as the state legislature may allow. The legislature has provided in Section 3 of the Court of Claims Act that the state's immunity from suit is waived only for claims brought in the Court of Claims which comply with the limitations of that Act. *See also*, *Breen* v. *Mortgage*

Commission of State of New York, 285 N.Y. 425, 35 N.E.2d 25 (1941); *Psaty* v. *Duryea*, *supra*; *Benz* v. *New York State Thruway Authority*, 9 N.Y.2d 486, 215 N.Y.S.2d 47, 174 N.E.2d 727 (1961); *Matter of Dormitory Authority*, 18 N.Y.2d 114, 119, 271 N.Y.S.2d 983, 987, 218 N.E.2d 693, 696 (1966) (concurring opinion).

It is true that the Supreme Court does have jurisdiction in certain kinds of actions for declaratory and injunctive relief. It need not be decided whether this case would qualify if it were confined solely to a request for declaratory and injunctive relief, for here the essence of the case is not declaratory, but rather monetary relief. The New York Constitution does not permit the plaintiffs to circumvent the legislatively established forum of the Court of Claims and bring such actions in this Court.

B. The Determination of Whether A Federally Approved State Medicaid Plan Provides For Reasonable Cost Reimbursement Is Not Subject To Judicial Review.

The 1977 New York State Medicaid Plan has been approved by HEW, the designated federal agency as required by federal law. Congress intended that HEW approval be the only occasion for review of state reimbursement plans under Medicaid, and that there be no judicial review of approved state plans. Accordingly, this case, which seeks judicial review and invalidation of HEW-approved plan provisions, should be dismissed.

The fact that the reimbursement methodology in the approved State Plan is unreviewable under federal law necessarily means also that it is unreviewable under state law. If the contrary were true and a state court were to invalidate a federally approved plan under state law and order that it not be implemented, the effect would be to elevate state law over federal law in violation of the Supremacy Clause, Article VI of the Constitution. In other words, federal approval preempts the field in the sense that the state is required to reimburse hospitals only in accordance with its federally approved State Plan. See, e.g., Rosado v. Wyman, 397 U.S. 397 (1970); Perez v. Campbell, 402 U.S. 637 (1971); Graham v. Richardson, 403 U.S. 365 (1971).

The legislative history of the "reasonable cost" reimbursement provision of the Medicaid statute demonstrates that Congress did not intend the determination of whether a State Medicaid Plan provides for reasonable cost reimbursement to be subject to judicial review.

The "reasonable cost" requirement is contained in 42 U.S.C. § 1396a(a)(13)(D). As amended in 1972, it requires that a State Plan must provide:

> (D) for payment of the reasonable cost of inpatient hospital services provided under the plan, as determined in accordance with methods and standards consistent with section 1320a-1 of this title, which shall be developed by the State and reviewed and approved by the Secretary and (after notice of approval by the

> Secretary) included in the plan, except that the reasonable cost of any such services as determined under such methods and standards shall not exceed the amount which would be determined under section 1395x(v) of this title as the reasonable cost of such services for purposes of subchapter XVIII of this chapter . . . .

Prior to 1972, the Medicaid statute contemplated reimbursement to service providers in the same manner employed in the Medicare program -- which is a solely federal program. The 1972 amendment was designed to broaden the states' discretion to develop new payment methods for Medicaid services, subject only to HEW approval. The provision originated in the House bill (H.R. 1) that was the precurser of Section 232 of the Social Security Act Amendments of 1972 (P.L. 92-603, 1972 U.S. Code Cong. & Adm. News, p. 1649). The House report on the bill described its impact as follows:

> Your committee's bill would allow States to develop their own methods and standards for reimbursement, thereby giving them flexibility in working satisfactory payment arrangements with their hospitals. The Secretary could disapprove a State's plan if it were shown to his satisfaction that the method developed by the State would not pay the actual and direct cost of providing care to medicaid eligibles. Reimbursement by the States would in no case exceed reasonable cost reimbursement as provided for under medicare.
>
> H. Rep. No. 92-231, 3 1972 U.S. Code Cong. & Adm. News, p. 5087.

This explanation manifests a clear intention that the approval or disapproval of the State's alternate formula for reimbursement be committed to the Secretary's discretion;

whether the alternate plan actually provides for reimbursement based on reasonable cost must be shown "to his satisfaction." In general, words of discretion such as "to his satisfaction" or "when he is satisfied" or "in his judgment" are strong evidence that the particular determination has been committed to agency discretion and is not subject to judicial review. E.g., Knight Newspaper Inc. v. United States, 395 F.2d 353, 357 (6th Cir. 1968); Ferry v. Udall, 336 F.2d (9th Cir. 1964), cert. denied, 381 U.S. 904 (1965).

The non-reviewability of the approved state reimbursement methodology is supported by the language and legislative history of the judicial review provisions of the Social Security Act, 42 U.S.C. § 1316. In 1965 the Act was amended specifically to provide for judicial review of a Secretary's determination concerning approval of a State medicaid plan at the petition of "any State dissatisfied with a determination by the Secretary." 42 U.S.C. § 1316 (emphasis supplied). Since the State would presumably only be dissatisfied with a determination of disapproval, the statutory scheme deliberately provides a mechanism for administrative and judicial review of a decision to disapprove but provides no mechanism for judicial review of a decision to approve. That no mechanism for review of approval was provided seems clearly to support the conclusion that the alternative of approval was committed solely to agency discretion.

Moreover, Congress has granted a state only a limited right to seek judicial review of disapproval. It must first exhaust administrative remedies, and thereafter cannot seek de novo review in the district court but must proceed to the court of appeals for the circuit in which the state is located. The court of appeals' review is to be based on the record developed during an adjudicatory administrative hearing, and it is provided that the Secretary's findings during that proceeding "shall be conclusive" if supported in the record. In the event that the court is not satisfied with the Secretary's findings, it may remand the case to the Secretary to make new or modified findings, and these "new or modified findings of fact shall likewise be conclusive if supported by substantive evidence." This carefully confined judicial review statute is strong evidence that Congress did not authorize the courts to entertain challenges by parties other than a dissatisfied state and did intend, even in that case, that the courts refrain from any kind of de novo review of the wisdom of HEW actions respecting state plans.

The 1965 amendments were premised on the understanding that HEW actions respecting state plans were unreviewable in the courts absent a statutory provision therefor. Statement of Senator Javits on introducing judicial review bill, 111 Cong. Rec. 3066 (Feb. 18, 1965); testimony of HEW Assistant Secretary for Legislation Wilbur J. Cohen before Senate Committee on Finance on H.R. 6675, 89th Cong., 1st Sess. 215 (April 29, 1965); H.R. Rep. No. 213 on H.R. 6675, 89th Cong., 1st Sess. 131 91965). Moreover, the legislative history reveals that there was opposition to affording any judicial review on the ground that this would impose unnecessary and time-consuming burdens on the courts and the governmental agencies and that the development of state plans should be left to negotiation between the states and HEW and not be subject to court review. Report of Advisory Commission to Intergovernmental Relations (May 1964), reproduced at 111 Cong. Rec. 3067 (Feb. 18, 1965). In the case of HEW disapproval actions, those concerns were outweighed by a congressional desire to "place the state on an equal basis with the federal government . . .. As the situation now stands, the federal agency definitely has the upper hand in the federal-state partnership because there is no recourse for the state beyond the decision of the Secretary . . .. Lack of a system of judical review tends to stifle initiative on the part of the states for fear anything new they initiate may be declared out of conformity with the Act." Report of Advisory Commission on Intergovernmental Relations, *supra*, 111 Cong. Rec. 3067, quoted in *County of Alameda* v. *Weinberger*, 520 F.2d 351 (9th Cir. 1976);*/ Statement of Senator Curtis, 111 Cong. Rec. 2714 (Feb. 16, 1965); H.R. Rep. No. 213 on H.R. 6675, *supra* at 131. For that reason judicial review was provided for, but only to the *state* in challenging disapproval actions. H.R. Rep. No. 213 on H.R. 6675, *supra* at 131. S. Rep. No. 404 on H.R. 6675, 89th Cong., 1st Sess. 150 (1965); Statement of Senator Javits, 111 Cong. Rec. 3066 (Feb. 18, 1965); Statement of Senator Curtis, 111 Cong. Rec. 2714 (Feb. 16, 1965); Statement of HEW Secretary Celebrezze before Senate Committee on Finance on H.R. 6675, 89th

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*/ Because the states and the federal government are partners in the provision of benefit programs, states have been permitted to challenge HEW actions adverse to them other than disapproval of state plans, notwithstanding the fact that the judicial review provisions of the Act do not directly speak to this question. *See* County of Alameda v. Weinburger, *supra*. In that case the court noted that the purpose of 42 U.S.C. § 1316 was to "strengthen federalism," and, toward that end, it was necessary to permit the states to challenge decisions by HEW having adverse fiscal consequences for the states. Moreover, the court in that case found that there was no legislative history or legislation directly dealing with the question of judicial review of HEW actions adverse to the states other than actions on state plans. Since Congress had not spoken in this other area, the court was unprepared to infer a congressional intent to preclude judicial review to the states. Here, by contrast, the suit was brought by a person other than the state, and its subject -- contesting HEW actions on state plans -- is the subject of a specific provision on judicial review in the statute.

Cong., 1st Sess. (April 29, 1965). Both congressional committees emphasized in adopting the limited judicial review of HEW disapproval actions that "these provisions are not intended to affect adversely the usual negotiation process between the Department of Health, Education and Welfare and the states which, in nearly all instances, results in the development of a state plan or plan amendment that can be approved by the Secretary." H.R. Rep. No. 213 on H.R. 6675, supra at 131; S. Rep. No. 404 on H.R. 6675, supra at 150. Judicial review was not afforded in the case where the state and HEW were able to agree on a plan through the "usual negotiation process."

This legislative history is the clearest evidence that Congress intends that HEW, not the courts, see to it that the states operate their programs in compliance with federal law.

The reasons for Congress' determination are evident. The decision as to whether or not a particular Medicaid reimbursement methodology developed by the State results in the reimbursement of only a hospital's reasonable costs requires complex economic determinations and specialized knowledge of the industry, which falls within the area of expertise of HEW. The question at issue here -- whether the New York State Plan provides for reasonable cost reimbursement, involves determination of such issues as the methods of hospital cost-accounting; allowability of reported costs for the purposes of reimbursement for services rendered to patients, the state-of-the-art in grouping hospitals for the purpose of peer comparisons, the present level of efficiency in hospitals, the degree of unnecessary hospital services or superfluous ancillary services rendered to hospital patients, the economic impact of reimbursement methodologies on hospitals, the processes of forecasting inflation, and the degree to which hospitals facing possible cost disallowances may contain costs, or increase efficiency, so as to stay within the cost ceilings.

Where such technical questions and complex economic determinations are committted to the legislative judgment of a specialized agency, courts have consistently refused to substitute their review for the expertise of the agency. *See*, *e.g.*, *Panama Canal Co.* v. *Grace Lines, Inc.*, 356 U.S. 309, 317 (1958); *Hahn* v. *Gottlieb*, 430 F.2d 1243, 1249 (1st Cir. 1970); *Grace Towers Tenants Ass'n* v. *Grace Housing Development Fund*, 538 F.2d 491, 495 n.2 (2d Cir. 1976); *Langevin* v. *Chenango Court, Inc.*, 447 F.2d 296 (2d Cir. 1971). Here Congress has clearly evidenced its intent that courts not become embroiled in the process of establishing reimbursement rates for providers under this massive federal-state benefit program, and this Court should decline to do so.

C. This Action Should Be Dismissed For Failure To Join the Secretary of The Department of Health, Education, and Welfare As A Necessary Party

Public assistance programs such as Medicaid have been characterized by the Supreme Court as "a scheme of cooperative federalism" between the state and federal governments." King v. Smith, 392 U.S. 301, 316 (1968); Jefferson v. Hackney, 406 U.S. 535 (1972). A state, if it choses to participate in the program, must comply with federal requirements if it is to receive matching federal funds. New York's Medicaid program is funded half by the federal government, one fourth by the state, and one fourth by the local governments.

As discussed supra at pp. 6-14, whether a State Plan meets federal statutory requirements and in particular the "reasonable cost" requirement is to be determined by the Secretary of HEW under 42 U.S.C. § 1396a(a)(13)(D)). If, as in the instant case, the Secretary decides after review of the State Plan that it does comply with federal requirements, the state must reimburse providers in accordance with the Secretary's determination. Failure to do so will subject a state to the compliance procedures of Title XIX, which can lead ultimately to loss of federal funding.

Thus in challenging the New York State Plan on the grounds that it fails to reimburse providers for their reasonable costs, plaintiffs are actually challenging the Secretary's approval of the Plan. If this Court should determine that the State Plan does not satisfy the federal requirements, and should order the state to reimburse providers in accordance with some formula other than that approved by HEW, it will in effect invalidate the Secretary's approval decision. To do so without joining the Secretary as a party to this action, and without considering the record before HEW or the reasons for its approval would not only "needlessly exacerbate . . . the strains inherent in [a program of cooperative federalism]," Rothstein v. Wyman, 467 F.2d 226 (2d Cir. 1972), but would seriously prejudice the rights of both the state, which must act in accordance with HEW approval or lose federal funding, and of HEW, which has been charged by Congress with the responsibility for approving State Plans and providing over a billion dollars in federal funding in accordance with its determination.

Plaintiffs, through their trade association the Hospital Association of New York State, Inc., arguing before the Federal District Court in their action challenging the State's 1976 State Plan, have in effect recognized that the Secretary of HEW is necessary to such a determination. In the August 24, 1977 letter from plaintiffs' counsel to Judge Lasker, he states at p. 7:

> "Finally, if plaintiffs are relegated to the State courts, then they may be unable to obtain a hearing on all of their claims. For example, it may be impossible to obtain State court jurisdiction over the Federal defendant, who may be a necessary and indispensable party to a determination of plaintiffs'

> claim that HEW's approvals of the amendments at issue were invalid (i.e., the subject of plaintiffs' summary judgment motion.

Since it is clear that this Court cannot fully determine the issues presented here in the absence of the Secretary of HEW, it should not allow this action to proceed in his absence.[*/]

D. Plaintiffs' Failure To Exhaust Available Administrative Remedies Bars This Action

Even if plaintiffs had proceeded against the State in the proper forum and the challenged methodology were subject to judicial review, plaintiffs' failure to exhaust available administrative remedies would bar this action.

Plaintiffs allege that they are not being reimbursed by the State the reasonable cost of providing in-patient

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[*/] Plaintiffs may contend that the difficulties of joining the Secretary of HEW as a party defendant in this action should excuse their failure to do so, particularly in view of the Eleventh Amendment bar against unconsented suits for monetary relief from the states. Although Congress was aware of the problem posed by the Eleventh Amendment bar to suits against the states in federal court and the preclusion of state court relief when the federal governmen could not be joined as a party, it nevertheless withdrew on constit tional grounds a consent-to-suit provision designed to aid provider of hospital services, stating:

> "The Committee notes, however, that the problem that gave rise to the original consent-to-suit provision is of concern. In addition there are others -- recipients of the program as well as other providers who may reasonably expect a more satisfactory way to assure that States administer their Medicaid programs in compliance with the requirements of Federal law. The Committee has requested the Department of Health, Education and Welfare to provide the Congress with recommendations for alternate ways to respond to these concerns. HEW has responsibility to assure that States operate in compliance with the requirements of the Federal law. If the tools available to it currently are not sufficient to accomplish this, the Committee expects the Department of Health, Education, and Welfare to request the changes in law that are needed. (H.R. Rep. No. 94-1122, 94th Cong., 2d Sess., 1976 at 5, 7).

Medicaid services as is required by state and federal law. The very regulations they challenge, 10 N.Y.C.R.R. Part 86, expressly provide in Sections 86-1.16 and 86-1.17 that a Medicaid provider which feels that its reimbursement rate is inadequate may appeal to the Commissioner of Health for review and revision of its rate. Neither of the named plaintiffs has taken and completed an appeal from its reimbursemen rate for the rate period beginning April 1, 1977.

The doctrine of exhaustion of administrative remedies requires litigants to address their complaints initially to the appropriate administrative tribunal rather than to the court and to exhaust all possibilities of obtaining relief through administrative channels before appealing to the courts. *Y.M.C.A. v. Rochester Pure Waters Dist.*, 37 N.Y.2d 371, 372 N.Y.S.2d 633, 636 (1975). Plaintiffs may not circumvent an available administrative appeals procedure, *Schwartz* v. *Bank Street College of Education*, 51 App. Div.2d 947, 381 N.Y.S.2d 282 (1976), particularly where following such a procedure "insures the benefit of trained and competent expert opinion and judgment" *Buffalo General Hospital* v. *Sepprell*, 33 App. Div. 2d 977, 307 N.Y.S.2d 407 (1970), *aff'd*, 27 N.Y.2d 585, 261 N.E.2d 402. Since the determination of whether a hospital is being reimbursed its reasonable cost of providing necessary and efficient services involves highly complex and technical questions requiring extensive knowledge of the hospital industry, it is particularly appropriate that the determination be made in the first instance by the expert state administrative body rather than by this Court.

E. At the Very Least This Action Should Be Stayed Since Another Action is Pending Between The Same Parties On Related Causes of Action

Declaratory and injunctive relief rests in the sound discretion of the court, *National Surety Corp*. v. *Peccichio*, 264 N.Y.S.2d 177, 48 Misc.2d 77 (Sup. Ct. Albany Cty. 1965); *Wood* v. *City of Salamanca*, [illegible] N.Y. 279, 45 N.E.2d 443, and such an action seeking such relief should not be entertained if another action between the parties, raising the same issues, is pending when it is commenced. *Canadian Imperial Bank of Commerce* v. *The Canadian Life Assurance Co*., 43 App. Div.2d 920, 352 N.Y.S.2d 203, appeal dismissed, 34 N.Y.2d 959, 316 N.W.2d 881, 359 N.Y.S. 2d 569 (1974); *Reynolds Metals Co*. v. *Speciner*, 6 App. Div.2d 863, 175 N.Y.S.2d 605 (1958); *Wollard* v. *Schaffer Stores Co*., 272 N.Y. 304, 211, 5 N.W.2d 829, 831 (1936).

On May 5, 1976, the Hospital Association of New York State, Inc. ("HANYS"), of which plaintiffs are members, commenced an action in the Federal District Court for the Southern District of New York against the same four state officials, on behalf of the same class that plaintiffs purport to represent in this action. HANYS challenged the promulgation and implementation of the 1976 State Plan (10 N.Y.C.R.R. Part 86) on grounds nearly identical to those alleged here -- that the methodology violated Plaintiffs' state and federal statutory and constitutional rights in that it failed to reimburse plaintiffs for their reasonable costs of providing in-patient Medicaid services, and that the methodology was improperly promulgated under state and federal law. In the federal court action, HANYS also included the Secretary of HEW as a defendant on the grounds that it was arbitrary and capricious.

While HANYS' complaint, as amended, in that action does not specifically extend the challenge to the 1977 State Plan, it appears from numerous statements plaintiffs have made during the proceedings in that case that they in fact intend to challenge all of those aspects of the 1977 methodology that originated in 1976 and remain in the State Plan (See attached letter of August 24, 1977 from Jacob Imberman, attorney for HANYS, to Judge Lasker). Trial of that case is now set for Septebmer 26, 1976, although the scope of the issues to be tried is currently under review by Judge Lasker.

It may be that issues plaintiffs are undertaking to raise in this case will be resolved in the federal action. While plaintiffs have added a few additional grounds for challenging the 1977 State Plan in this action, they have made clear that they are presently contesting in federal court provisions contained in the 1977 methodology on the ground that they do not provide for reasonable cost reimbursement. (See attached Imberman letter). That is their primary basis for requesting prospective relief from the federal court. Their representative, HANYS, has also stated in a prepared presentation to HEW of March 30, 1977, that the 1977 methodology for in-patient reimbursement cannot be considered piecemeal but must be reviewed as a whole to determine if it results in reasonable cost reimbursement:

> When the Department of Health. Education, and Welfare must evaluate numerous proposals for substantive revisions to the New York State Title XIX Plan, it does not seem appropriate to consider them only singly and in the abstract. They ought to be examined in consideration of their interaction with the rest of the State Plan as presently applied and with the philosophy of prospective reasonable cost reimbursement.

Comments of Hospital Association of New York State on Proposed Amendments Effective April 1, 1977 To The New York State Title XIX Plan, March 30, 1977 at ii.

The Court, in the exercise of its discretion, should not allow plaintiffs to litigate such closely related issues in two forums simultaneously. Accordingly this action should be dismissed or stayed until there is some resolution of the scope of the preexisting lawsuit in federal court.

Conclusion

For the foregoing reasons, defendants respectfully ask for a judgment dismissing the complaint in this action, or staying this action pending the outcome of the closely-related federal court litigation, and granting such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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Attorneys for Defendants

Dated: August 30, 1977

SUPREME COURT OF THE
STATE OF NEW YORK

COUNTY OF KINGS

- - -

INDEX No. 16058/77

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THE BROOKLYN HOSPITAL,
et al.,

Plaintiffs,

- against -

ROBERT P. WHALEN, M.D.,
as Commissioner of
Health of the State of
New York, *et al.*,

Defendants.

- - -

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

- - -

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State of New YOrk
Charles A. Miller
Robert N. Sayler
Patricia A. Barald
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., et al.,

Plaintiffs,

- against-

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, et al.,

Defendants.

- -x

76 Civ. 2027
(MEL)

CLASS PLAINTIFF NEW YORK CITY HEALTH AND HOSPITALS CORPORATION'S MEMORANDUM IN OPPOSITION TO THE STATE DEFENDANTS' MOTION TO DISMISS

Class Plaintiff New York City Health and Hospitals Corporation ("HHC") submits this Memorandum and the accompanying affidavit of Peter F. Nadel, Esq., sworn to September 28, 1977, in opposition to the State Defendants' motion to dismiss this action, made September 23, 1977.

HHC's position on the question presented by this motion is set forth in its letters to the Court dated August 25, 1977 (a copy of which is annexed hereto as Appendix A) and September 12, 1977 (a copy of which is annexed hereto as Appendix B). HHC's letters supplement the Named Plaintiffs' letters to this Court dated August 24, 1977 (Exhibit 1 to the

Named Plaintiffs' Memorandum in opposition to the instant motion) and September 9, 1977 (Exhibit B to the State Defendants' Memorandum in support of the instant motion).

It is respectfully submitted that for the reasons set forth in the Named Plaintiffs' Memorandum and the letters submitted to this Court by the Named Plaintiffs and HHC, the State Defendants' motion should in all respects be denied.

Dated: New York, New York
September 28, 1977

Respectfully submitted,

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APPENDIX A

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ANDREW J. SCHOEN
JACK E. BRONSTON
ASA D. SOKOLOW
MAURICE H. GOETZ
SAMUEL H. LINDENBAUM
IRWIN JAY ROBINSON
GILBERT S. EDELSON
ARNOLD I. ROTH
GEORGE I. GORDON
LAWRENCE B. BUTTENWIESER
EUGENE L. VOGEL
GERALD WALPIN
MAL L. BARASCH
H. PAUL BURAK
HOWARD SCHNEIDER
EDWARD H. COHEN
FLORA SCHNALL
PETER F. NADEL
LEE H. ROBINSON
FRANK R. ROSINY
JOSEPH ZUCKERMAN
ROBERT W. GOTTLIEB
MARK I. FISHER
JOSEPH L. GETRAER
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August 25, 1977

BY HAND

Honorable Morris E. Lasker
United States District Court
United States Courthouse
Room 1903
Foley Square
New York, New York 10007

Re: Hospital Association of New York State, Inc., et al. v. Toia, et al., 76 Civ. 2027 (MEL)

Dear Judge Lasker:

I am writing on behalf of Peter Nadel, who is presently on vacation.

Pursuant to Your Honor's request at the conference on August 11, 1977, Jacob Imberman, Esq., has written to you, by letter dated August 24, 1977, setting forth Plaintiffs' views on the State Defendants' assertions as to mootness. We concur with the matters set forth by Mr. Imberman, however, we wish to point out an additional reason why this action is far from moot.

As Your Honor was advised at the August 11 conference, an action has been commenced in state court, on behalf of the hospital members of the Plaintiff class, challenging certain State Plan amendments that were approved by HEW on or about March 31, 1977. In addition, class Plaintiff New York City Health and Hospitals Corporation plans to commence an action in federal court shortly, challenging the validity of HEW's approval.

If Plaintiffs prevail in one or both of these actions, Plaintiffs would be entitled to an order prohibiting the use of the 1977 amendments to determine reimbursement rates and requiring that the prior valid and properly approved methodology be reinstated. Plaintiffs contend that such methodology is not the 1976 State Plan (but is, instead, the 1975 State Plan), inasmuch as the 1976 Plan and its approval by HEW are invalid. Thus, the 1977 actions are likely to require a determination of the validity of the 1976 Plan and of HEW's approval thereof -- the very issues now before this Court.

"Courts have long recognized the principle that a case is not moot if there is [as in this action] a reasonable likelihood that the parties or those in privity with them will be involved in a suit on the same issues in the future." In such a situation, the issue likely to be raised again in the absence of a present decision should be decided. American Bible Society v. Blount, 446 F.2d 588, 595 (3rd Cir. 1971). The issuance of a declaratory judgment and an injunction prohibiting the use of the 1976 State Plan will avoid the need to litigate these issues at a later date, and such relief is plainly appropriate in this action.

For the foregoing reasons and those set forth by Mr. Imberman, this action is simply not moot and this Court is empowered to decide Plaintiffs' pending motion for summary judgment as well as any issues that may thereafter remain for trial.

Respectfully submitted,

Nadia C. Adler

NCA:lr

cc: Honorable Morris E. Lasker
Box 167
Chilmark, Massachusetts 02535

Jacob Imberman, Esq.
Robert Sayler, Esq.
John M. O'Connor, Esq.

APPENDIX B

ROSENMAN COLIN FREUND LEWIS & COHEN

575 MADISON AVENUE NEW YORK, N.Y. 10022

MAX FREUND
AMBROSE DOSKOW
SEYMOUR D. LEWIS
LAWRENCE R. ENO
MURRAY COHEN
WILLIAM W. GOLUB
MENDES HERSHMAN
MANUEL MAXWELL
ANDREW J. SCHOEN
JACK E. BRONSTON
ASA D. SOKOLOW
MAURICE H. GOETZ
SAMUEL H. LINDENBAUM
IRWIN JAY ROBINSON
GILBERT S. EDELSON
ARNOLD I. ROTH
GEORGE I. GORDON
LAWRENCE B. BUTTENWIESER
EUGENE L. VOGEL
GERALD WALPIN
MAL L. BARASCH
H. PAUL BURAK
HOWARD SCHNEIDER
EDWARD H. COHEN
FLORA SCHNALL
PETER F. NADEL
LEE H. ROBINSON
FRANK R. ROSINY
JOSEPH ZUCKERMAN
ROBERT W. GOTTLIEB
MARK I. FISHER
JOSEPH L. GETRAER
LAWRENCE G. GOLDE
NORMAN J. ITZKOFF
JOEL A. YUNIS
JOEL W. STERNMAN

SAMUEL I. ROSENMAN
1896-1973

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TELECOPIER (212) 644-6969
TELEX 12-5745
236241

WRITER'S DIRECT DIAL NUMBER
(212) 644-6963

September 12, 1977

BY HAND

Honorable Morris E. Lasker
United States District Court
United States Courthouse
Room 1903
Foley Square
New York, New York 10007

Re: Hospital Association of New York State, Inc., et al. v. Toia, et al., 76 Civ. 2027 (MEL)

Dear Judge Lasker:

I am writing to briefly supplement Mr. Imberman's reply to Mr. Charles Miller's September 3, 1977, submission on the mootness issue.

In our August 25, 1977 letter, we advised the Court that HHC planned to commence an action challenging HEW's approval of certain 1977 State Plan amendments, which would raise the same issues which the State Defendants now claim to be moot. Subsequently, on September 9, 1977, HHC commenced the lawsuit as planned. (New York City Health and Hospitals Corporation v. Joseph A. Califano, Jr., et al., 77 Civ. 4483 (KTD)). Moreover, as the Court is aware, there is a suit pending in state court challenging the validity of certain 1977 State Plan amendments.

Thus, it is clear that the issues claimed to be moot are "reasonably likely" to be raised in a future suit between the same parties or those in privity with them, Mr. Miller's erroneous contentions (p. 5, footnote 3) that HHC's position is "speculative" to the contrary notwithstanding. Accordingly, for this reason as well as those set forth by Mr. Imberman, this action is not moot. American Bible Society v. Blount, 446 F.2d 588, 595 (3rd Cir. 1971).

It is absurd to halt the adjudication of the validity of the 1976 plan and the approval now, just when the parties and the Court are fully prepared to go ahead with a presentation of those questions, and at a time when the record is fresh, and to require instead the litigation of these issues at some future time in either or both of the pending 1977 actions.

Respectfully submitted,

Peter F. Nadel

PFN:lr

cc: Jacob Imberman, Esq.
Robert Sayler, Esq.
John M. O'Connor, Esq.

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Served By mail 10/13/77 LL
Filed ~~Received~~ 10/13/77 1-3A
Entered in Docket ____
Entered in Diary For ____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., MISERICORDIA HOSPITAL MEDICAL CENTER, BUFFALO GENERAL HOSPITAL, THE GENESEE HOSPITAL, and THE MOUNT SINAI HOSPITAL on behalf of themselves and all other nonprofit hospitals which are members of the HOSPITAL ASSOCIATION OF NEW YORK STATE, INC. and which are reimbursed for Medicaid services rendered to hospital patients,

Plaintiffs,

-against-

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, ROBERT P. WHALEN, as Commissioner of Health of the State of New York, PETER GOLDMARK, as Director of the Budget of the State of New York, HUGH L. CAREY, as Governor of the State of New York, and F. DAVID MATHEWS, as Secretary of the U.S. Department of Health, Education & Welfare,

Defendants.

76 Civ. 2027
(MEL)

AMENDED NOTICE OF APPEAL

Notice is hereby given that the Hospital Association of New York State, Inc., Misericordia Hospital Medical Center, Buffalo General Hospital, The Genesee Hospital, and The Mount Sinai Hospital on behalf of themselves and all other nonprofit hospitals which are members of the Hospital Association of New York State, Inc. and which are reimbursed for Medicaid services rendered to hospital patients, plaintiffs above-named ("plaintiffs") hereby appeal to the United States Court of Appeals for the Second Circuit from the order entered August 15, 1977; amended and entered as amended September 16, 1977:

(1) granting the motion to dismiss the complaint made by defendants Toia, Whalen, Goldmark and Carey ("State defendants") insofar as the complaint seeks monetary relief;

(2) vacating the Court's order entered August 2, 1976 insofar as it awarded monetary relief against the State defendants and vacating all subsequent orders relating to monetary relief to be afforded to plaintiffs; (3) directing the plaintiffs to promptly refund those funds paid to plaintiffs pursuant to the Court's order of August 2, 1976, and subsequent orders directing the provision of monetary relief, but not preventing plaintiffs from exercising in any other Court such legal rights as they may have in relation to the subject matter of the suit, insofar as the order entered in this action on the 15th day of August, 1977, amended and entered as amended September 16, 1977 applies to the State defendants.

Dated: New York, New York
October 12, 1977

PROSKAUER ROSE GOETZ & MENDELSOHN

By: Jacob Imberman
A Member of the Firm
Attorneys for Plaintiffs
300 Park Avenue
New York, New York 10022
(212) 593-9000

TO:

ALAN MOLLER, ESQ.
Assistant Attorney General
Attorney for State Defendants
Two World Trade Center
New York, New York 10048

COVINGTON AND BURLING, ESQS.
Attorneys for State Defendants
888 Sixteenth Street, N.W.
Washington, D.C. 20006

JOHN M. O'CONNOR, ESQ.
United States Attorney's Office
Attorney for Defendant Mathews
1 St. Andrew's Plaza
New York, New York 10007

PETER NADEL, ESQ.
Rosenman Colin Freund Lewis & Cohen
Attorneys for New York City Health
and Hospitals Corporation
575 Madison Avenue
New York, New York 10022

SOUTHERN DISTRICT OF NEW YORK

erved

Oce.
~~Received~~ 10/14/77 --

Entered in Docket ✓

Entered in Diary For

HOSPITAL ASSOCIATION OF NEW YORK
STATE, INC., et al.,

Plaintiffs,

- against -

PHILIP L. TOIA, as Commissioner of
Social Services of the State of
New York, et al.,

Defendants.

76 Civ. 2027 (MEL)

U. S. DISTRICT COURT
FILED
OCT 14 1977
S. D. OF N. Y.

ORDER

Upon consideration of the state defendants' motion to dismiss the complaint, plaintiffs' response thereto, and the entire record herein, and after a conference with counsel on September 14, 1977, it is hereby

ORDERED that for the reasons set forth in the state defendants' Memorandum of Points and Authorities dated September 23, 1977, this action is dismissed except with respect to the issue of whether the approval by the Secretary of the Department of Health, Education, and Welfare of the 1976 state plan for inpatient hospital service reimbursement was deficient because of inadequate consideration or faulty approval procedures.

Morris E Lasker

Morris E. Lasker
United States District Judge

October
~~September~~ 13, 1977

MEMO. ENDORSED

U. S. DISTRICT COURT
FILED
SEP 27 1977
S. D. OF N. Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., et al.,

Plaintiffs,

v.

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, et al.,

Defendants.

76 Civ. 2027 (MEL)

NOTICE OF MOTION

Served

~~Received~~ Sbt. 10/4/77

Entered In Docket ✓

Entered In Diary For

SIRS:

PLEASE TAKE NOTICE that the undersigned will move this Court at 10:00 a.m. on September 30, 1977, Room 1903, United States Courthouse, Foley Square, New York, New York, for an Order dismissing the Complaint, in whole or in part, as set forth more fully in the Memorandum of Points and Authorities in support of this Motion.

PLEASE TAKE FURTHER NOTICE that, pursuant to the provisions of Rule 9(c)(2) of the General Rules of

U.S. DISTRICT COURT
FILED
OCT 14 1977
S. D. OF N. Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., et al.,

Plaintiffs,

v.

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, et al.,

Defendants.

76 Civ. 2027 (MEL)

Notice of Motion

State Defendants' Motion to Dismiss the Complaint

Proposed Orders

Memorandum of Points and Authorities in Support of Motion to Dismiss the Complaint, with Exhibits

Motion granted to
the extent indicated
in the attached.
proposed order, ~~[illegible]~~
memorandum to follow
~~[illegible]~~.

MEL & the complaint ~~[illegible]~~
as to ~~[illegible]~~ defendants
~~[illegible]~~

It is so ordered
Morris E. Lasker
USDJ

10/13/77

COVINGTON & BURLING
888 SIXTEENTH STREET, N. W.
WASHINGTON, D.C. 20006

ved __________

Received 10/14/77

Entered in Docket ✓

Entered in Diary For __________

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
------------------------------------X

HOSPITAL ASSOCIATION OF NEW YORK,
STATE, INC., et al.,

Plaintiffs, 76 Civ. 2027

-against-

PHILIP L. TOIA, et al.,

Defendants.
------------------------------------X

The court having heretofore on the 13th day of October, 1977, filed an order dismissing the complaint as to the state defendants herein, but not otherwise, and it appearing to the court that judicial economy will be served by a prompt disposition of any appeal from this order, since an appeal is already pending in the Court of Appeals on related issues, and inasmuch as a finding by the Court of Appeals that these claims are not moot would reinstate the plaintiffs' claims against the state defendants for a trial on the merits, that the matter is of substantial public importance, that this order eliminates four of the five original defendants and has no impact on the remaining defendant, that claims against those eliminated are severable from the remainder of the original action, therefore, it is

ORDERED that there is no just reason for delay and the Clerk of this Court is directed to enter a final judgment upon the order herein.

Dated: New York, New York
October 14, 1977

MORRIS E. LASKER
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------------------------------------x

HOSPITAL ASSOCIATION OF NEW YORK STATE INC., MISERICORDIA HOSPITAL MEDICAL CENTER, BUFFALO GENERAL HOSPITAL, THE GENESEE HOSPITAL, and THE MOUNT SINAI HOSPITAL on behalf of themselves and all other nonprofit hospitals which are members of the HSOPITAL ASSOCIATION OF NEW YORK STATE, INC. and which are reimbursed for Medicaid services rendered to hospital patients,

Plaintiffs,

76 Civ. 2027
(MEL)

- against -

NOTICE OF APPEAL

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, ROBERT P. WHALEN, as Commissioner of Health of the State of New York, PETER GOLDMARK, as Director of the Budget of the State of New York, HUGH L. CAREY, as Governor of the State of New York, and F. DAVID MATHEWS, as Secretary of the U.S. Department of Health, Education and Welfare,

Defendants.

---------------------------------------x

Notice is hereby given that the Hospital Association of New York State, Inc., Misericordia Hospital Medical Center, Buffalo General Hospital, The Genesee Hospital, and The Mount Sinai Hospital on behalf of themselves and all other nonprofit hospitals which are members of the Hospital Association of New York State, Inc. and which are reimbursed for Medicaid services rendered to hospital patients, plaintiffs above-named ("plaintiffs") hereby appeal to the United States Court of Appeals for the Second Circuit from the final judgment entered October 18, 1977 granting the motion to dismiss the complaint made by defendants Toia, Whalen, Goldmark and Carey ("State defendants") except with respect to the issue of the validity of defendant Mathews' approval of the 1976 amendments to the New York State Medical Plan, insofar as the final judgment entered in this action on the 18th day of October, 1977 applies to the State defendants.

Dated: New York, New York
October 19, 1977

PROSKAUER ROSE GOETZ & MENDELSOHN

By ________________________
A Member of the Firm
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TO:

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Assistant Attorney General
Attorney for State Defendants
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United States Attorney's Office
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New York, New York 10007

PETER NADEL, ESQ.
Rosenman Colin Freund Lewis & Cohen
Attorneys for New York City Health
and Hospitals Corporation
575 Madison Avenue
New York, New York 10022

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Nina C. Augello being duly sworn, deposes and states:

I am not a party to the action, am over 18 years of age and reside at Sunnyside, New York

On November 7, 1977, I served the attached Joint Appendix I & II upon the following attorney(s) at the address designated by him (them) for that purpose:

Covington & Burling, Esqs.
888 Sixteenth Street, N.W.
Washington D.C. 20006

Said service was made by depositing a true copy of the attached Joint Appendix I & II enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Nina C. Augello
Nina C. Augello

Sworn to before me this
7th day of November 1977.

Melinda Lou Cannon

MELINDA LOU CANNON
NOTARY PUBLIC, State of New York
No. 31-4644145
Qualified in New York County
Commission Expires March 30, 1979

COPY RECEIVED
Robert B. Fiske Jr.
UNITED STATES ATTORNEY
11/7/77
Marian L. Bryant

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NOV 7 1977
ROSENMAN COLIN FREUND LEWIS & COHEN
ATTORNEYS FOR

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